CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 71.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* SIMON LIEBERMAN, PLAINTIFF IN ERROR,

vs.

JOHN E. VAN DE CARR, WARDEN OF THE CITY PRISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 2, 1904.

(19,431.)

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a Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 25th day of June, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witnesss the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, Clerk.

Remittitur, June 26th, 1903.

b PEOPLE OF THE STATE OF NEW YORK, *ex Rel.* SIMON LIEberman, Appellant,
against
JOHN E. VANDE CARR, Warden of the City Prison, Respondent.

Be it remembered, that on the 12th day of May, in the year of our Lord one thousand nine hundred and three, Simon Lieberman, relator, the appellant in this proceeding came here into the court of appeals, by Frank Moss, his attorney, and filed in the said court a notice of appeal and return thereto from the order & judgment of the appellate division of the supreme court in and for the first judicial department. And John E. Vande Carr, warden, &c., the respondent in said proceeding, afterward appeared in said
c court of appeals by George L. Rives, corporation counsel, his attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals having heard this proceeding by Mr. Frank Moss, of counsel for the appellant, and by Mr. Theodore Connoly, assistant corporation counsel, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order and judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Wherefore, it is considered that the said order and judgment be, and the same hereby is, affirmed, as aforesaid.

d And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which

record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, June 26th, 1903.

[SEAL.] I hereby certify that the preceding record contains a correct transcript, of the proceedings in said proceeding in the court of appeals, with the papers originally filed therein attached thereto.

W. H. SHANKLAND, Clerk.

e Court of Appeals, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* SIMON Lieberman, Relator-Appellant,
against
JOHN E. VANDECARR, Warden of the City Prison, Respondent.

Case on Appeal.

Frank Moss, attorney for appellant, 93 Nassau street, New York.
George L. Rives, corporation counsel.
Wm. Travers Jerome, district attorney.

1 Petition for Writ of Habeas Corpus.

To the supreme court of the State of New York, county of New York:

The petition of Samuel Mareus, of the city of New York, in behalf of Simon Lieberman, respectfully shows:

That said Simon Lieberman is restrained in his liberty within the State of New York, and that he is not committed or detained by virtue of any process or mandate issued by any court of the United States, or by any judge thereof, nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause, nor by virtue of any execution or other process issued upon a judgment, decree or final order. The cause or pretense of the imprisonment or restraint is as follows: An information was laid against him by Charles H. Kilbourne, an inspector of the board of health, before John B. Mayo, city magistrate, on a charge of violating section 66 of the Sanitary Code of the City of New York, by receiving, holding, keeping or offering for sale milk in the city of New York without a permit, in writing, from the board of health.

An examination was held by the said magistrate, upon which the procedure occurred which is recited in Schedule A, hereto an-

nexed, said schedule containing all the testimony and proceedings verbatim.

After such examination he was held to answer, and he is now restrained in his liberty by John E. Vandecarr, warden and keeper of the city prison of the city of New York, who detains him and keeps him in confinement in the said city prison, commonly
2 called the "Tombs," which is situated at Centre and Franklin streets, in the borough of Manhattan, city, county and State of New York. That said Vandecarr claims to detain him by virtue of a certain commitment made by the said John B. Mayo, city magistrate, a copy of which is hereto annexed and marked Exhibit B.

Your petitioner claims that there was no crime charged by the complaint or information, or by the testimony; that section 66 of the Sanitary Code is invalid, being unauthorized in law and unconstitutional, and that the said John B. Mayo, magistrate, was without jurisdiction to act in the matter.

Wherefore, your petitioner prays that a writ of *habeas corpus* issue, directed to the said John E. Vandecarr, commanding him to produce the body of the said Simon Lieberman, together with the time and cause of imprisonment.

SAMUEL MARCUS, Petitioner.

CITY AND COUNTY OF NEW YORK, *ss:*

Samuel Marcus, the petitioner, being duly sworn, says: That the facts set forth in the above petition by him subscribed are true.

SAMUEL MARCUS.

Sworn to before me this 22d day of October, 1902.

MORRIS A. HULETT,
Notary Public, Kings Co.

Cert. filed in New York county.

3 EXHIBIT "A."

City Magistrate's Court, First Division, Third District.

THE PEOPLE OF THE STATE OF NEW YORK on Complaint of
Charles H. Kilbourne
against
SIMON LIEBERMAN.

NEW YORK, October 10th, 1902.

Before Hon. John B. Mayo, City Magistrate.

Offence Charged: Violation Sanitary Code.

Appearances: F. W. Stelle, Esq., assistant corporation counsel, for The People. Frank Moss, Esq., for the defendant.

CHARLES H. KILBOURNE, called as a witness on behalf of The People, being first duly sworn, testifies as follows:

Direct examination by Mr. STELLE:

Q. What is your full name?

4 A. Charles H. Kilbourne.

Q. Mr. Kilbourne, are you an inspector in the department of health?

A. I am.

Q. On the eighth day of October did you visit the premises 43 Delancey street, in the city of New York?

A. I inspected the wagon opposite those premises.

Q. Describe the wagon.

A. It was a large milk wagon, which contained several cans of milk. There was a driver on the wagon, who said his name was Mike Schmidt. I took a sample of the milk from the wagon, and I asked him if he had left milk in this particular store, and if he was selling milk; he said he was. I also went into the store and asked in the store.

Q. Did you subsequently see this defendant?

A. On the same morning I went to his residence at 81 Henry street with another inspector and saw Mr. Lieberman, the defendant.

Q. What is his name?

A. Mr. Simon Lieberman.

Q. What did you do?

A. Asked him if he had received a sample of the milk taken from his wagon that morning, and asked him if Mr. Mike Schmidt was in his employ; he said he was. I also asked him if he had received a notice of the denial of his application for a permit; he said he had.

Q. Are you familiar with his application for a permit?

A. I have the application here, yes; signed Simon Lieberman, by his mark.

By Mr. Moss:

Q. Was this in your presence?

A. No, sir.

By Mr. STELLE:

Q. Was there a permit number on the wagon that you saw?

5 A. I think there was a wagon permit—number 1966.

Q. Was that permit revoked by the department of health?

A. Yes.

Mr. STELLE: I offer in evidence certificate of the secretary of the board of health as to the revocation of permit number 1966 on July 9th.

(Same admitted and marked in evidence Exhibit 1, October 10th, 1902.)

By Mr. STELLE:

Q. Subsequent to the revocation of that permit was there an application made for a renewal of it?

A. There was.

Mr. Moss: I object to that, as no application for renewal is shown.

Mr. STELLE: I offer the application in evidence.

Mr. Moss: I object to that as not being proved.

The MAGISTRATE: Objection sustained.

Mr. Moss: I move that the last answer be stricken out.

The MAGISTRATE: Motion granted.

By the MAGISTRATE:

Q. You do not know whether he signed that paper, or made his mark, do you?

A. I didn't see him do it.

Q. You do not know whether he did or not?

A. No, not of my own knowledge.

Cross-examination by Mr. Moss:

Q. You have charge of this prosecution, have you?

6 A. In this particular case; yes, sir.

Q. What is your position in the board of health?

A. Inspector.

Q. Is this official business of the board of health?

A. Yes, sir.

Q. You were directed by your superiors in the board in this case?

A. Yes, sir.

Q. And you report to your superior about it?

A. I do.

Q. Have you had any conversation with the commissioner of health, Doctor Lederle, the official in charge, about this case, or any other case?

A. Not with the commissioner, no.

Q. You say that the defendant had a permit number 1966?

A. There was a sign on the wagon, 1966.

Q. And you say that permit was revoked on the ninth of July?

A. Yes, sir.

By Mr. STELLE:

Q. Was anyone with you at the time of your call on Mr. Lieberman?

A. Yes, sir; Doctor Smith; A. K. Smith.

A. K. SMITH, called as a witness on behalf of The People, being first duly sworn, testifies as follows:

Direct examination by Mr. STELLE:

Q. Are you an inspector in the department of health?

A. I am.

Q. Did you go with Mr. Kilbourne to see this defendant on the eighth day of October?

A. I did.

7 Q. You heard the conversation between Mr. Kilbourne and the defendant?

A. I did.

Q. What was that conversation?

A. He asked Mr. Lieberman if he got the notice from the board of health that his permit was revoked, and he said he did. He asked him if Mike Schmidt was his driver in his employ, and he said he was.

By the MAGISTRATE:

Q. Is that all that you recall?

A. They had some conversation about the standing of the milk, and so forth, and he said it stood well.

By Mr. Moss:

Q. Who was it that said it stood well?

A. Mr. Kilbourne.

Q. Dr. Kilbourne?

A. Yes, sir.

By Mr. STELLE:

Q. What was that, the quality of the milk?

A. The quality of the milk; yes, sir.

Mr. STELLE: As long as objection has been *been* made to the introduction of this application for a permit, I will have to ask that the case be adjourned, on the ground that the permit clerk is on his vacation.

Mr. Moss: You have proved that he has admitted that he received a notice of the revocation of the permit and a notice of the denial of his application. Isn't that all you want?

Mr. STELLE: We have not any admission in there that he received notice of the revocation.

8 Mr. Moss: I will concede upon the record that, prior to the eighth day of October, 1902, he received notice from the board of health that his permit, number 1966, had been revoked.

Mr. STELLE: I offer in evidence section 66 of the Sanitary Code, which provides as follows:

No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit in writing from the board of health, and subject to the conditions thereof.

It is admitted that prior to July 9th, 1902, the defendant, Simon Lieberman, was in possession of a permit from the board of health, number 1966, for the sale of milk from the wagon testified to herein.

Mr. Moss: The defendant moves to dismiss the complaint upon the ground that section 66 of the Sanitary Code offered in evidence

is without authority; it is unconstitutional and entirely outside of the authority granted by the legislature to the board of health.

The MAGISTRATE: The motion is denied.

Mr. Moss: We will waive further examination, and under all the circumstances I ask that the bond be as small as is consistent with your honor's best judgment.

Testimony closed.

EXHIBIT "B."

"Commitment."

It appearing to me by the within depositions and statements that the crime therein mentioned has been committed, and that
9 there is sufficient cause to believe the within-named defendant guilty thereof, I order that he be held to answer the same, and he be admitted to bail in the sum of $100, and be committed to the warden and keeper of the city prison of the city of New York until he give such bail.

Dated Oct. 10, 1902.

JOHN B. MAYO,
City Magistrate.

Writ of Habeas Corpus.

The People of the State of New York to John E. Vandecarr, warden and keeper of the city prison of the city of New York:

We command you, that you have the body of Simon Lieberman, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Simon Lieberman is called or charged, before the supreme court of the State of New York, at a special term thereof, to be held in part 2, at the county court house, in the borough of Manhattan, New York city, on the 22d day of October, 1902, at two o'clock in the afternoon of that day, to do and receive what shall then and there be considered concerning him, and have you then and there this writ.

Witness, Hon. Alfred Steckler, one of the justices of the supreme court of the State of New York, the twenty-second day of October, one thousand nine hundred and two.

THOMAS L. HAMILTON, Clerk.

By the court.
FRANK MOSS,
Attorney for Petitioner,
[SEAL.] 93 Nassau Street, New York City.

10 Endorsed: New York supreme court.—The People of the State of New York, *ex rel.* Simon Lieberman, relator, against John E. Vandecarr, warden, &c.—Writ of *habeas corpus*.—Frank Moss, attorney for petitioner, 93–99 Nassau street, borough of Man-

hattan, New York city.—The within writ allowed this 22d day of October, 1902.—Alfred Steckler, justice of the supreme court of the State of New York.

Return of Warden of City Prison.

The undersigned, warden of city prison, respectfully returns and says: That he received the annexed paper, marked "A," on the 22d day of October, A. D. 1902, at 11 o'clock, a. m., at which time there was in the city prison, of which he is warden, the body of Simon Lieberman, who he believes to be the person named in said paper marked "A," and who was so there under custody as being the person named in an original paper, of which the annexed paper marked "B" is a copy (and the original whereof I now produce).

And so returning, the undersigned produces the body of said person, in obedience to the command expressed in paper "A."

JOHN E. VANDECARR,
Warden of City Prison.

New York, 22d day of October, 1902.

11 Court of Special Sessions of the First Division of the City of New York.

Dated 22d Day of October, 1902.

THE PEOPLE OF THE STATE of New York
vs.
SIMON LIEBERMANN.
} On Charge of Vio. Sec. 66, Sanitary Code, Department of Health of the City of New York.

Ordered, that the said Simon Liebermann, having forfeited his recognizance, stand committed to the custody of the keeper of the city prison of the city of New York until thence delivered by due course of law, or until he shall furnish further bail in the sum of one hundred dollars, to answer to the said charge.

A true extract from the minutes.

WM. FULLER,
Clerk of Court.

A true copy of the original commitment.

12 Traverse to Return.

New York Supreme Court.

THE PEOPLE *ex Rel.* SIMON LIEBERMAN
against
JOHN E. VAN DE CARR.
} Traverse.

The said Simon Lieberman, traversing the return, and alleging facts showing that his imprisonment and detention are unlawful,

and that he is entitled to his discharge, respectfully shows to the court:

I. That on October 22, 1902, he was surrendered by his bail in the court of special sessions, and was thereupon committed to the city prison by the justices of said court, upon the proceedings which had been taken before the Hon. John B. Mayo, magistrate, and without any new testimony.

II. That upon said proceedings before said magistrate no crime was charged against the said Simon Lieberman; and that upon the testimony for the prosecution taken before said magistrate, no crime was proved against the said Simon Lieberman, and no evidence was presented that a crime had been committed, or that there was sufficient cause to believe that the said Simon Lieberman committed a crime.

III. That annexed hereto are true copies of the proceedings before the said magistrate and in the court of special sessions, and a true copy of all the testimony taken upon the hearing. That
13 no testimony was given by or on behalf of the said Simon Lieberman.

IV. That section 66 of the so-called Sanitary Code was adopted on the 16th day of February, 1898, and that at that time there were various other sections of said Sanitary Code relating to the matter of receiving, holding, keeping, offering for sale or delivering milk in the city of New York, to wit, sections 44, 51, 56, 59, 63, 64, 65, 67, 88, true copies of which sections are hereto annexed.

V. That there is no other article or class of food besides milk referred to in said sanitary code which may not be received, held, kept, offered for sale or delivered in the city of New York, without a permit from the board of health, except live fowls (sec. 79) and mineral waters (sec. 202, adopted July 13, 1902).

VI. That there are many commodities and articles of food which are of common use in the city of New York and which may be the means for the carrying and distribution of germs, or which may become dangerous to health, or may be adulterated with deleterious articles, that are not made the subjects of such permits by the board of health, by any provision of the said Sanitary Code, including meat, fish, vegetables, fruit, bread, baking powders, wines, beers and liquors. That for the keeping or selling of these articles no permit whatever is required in said Sanitary Code.

VII. The relator shows further that the only occupations and matters which in said Sanitary Code are subject to permits of the board of health are the following:

Section 21,	Smoke house in tenement.
26,	Keeping lodging houses.
42 & 43,	Privy milks, &c.
14 66,	Receiving, holding, keeping, offering for sale or delivering milk.
62,	Using wells adjoining dwellings, &c.

69, 76 & 78,	Unloading and driving cattle, sheep and swine.
70,	Keeping swine or goats.
72 & 80,	Keeping cows.
73,	Keeping cattle, swine, sheep, geese, goats and horses in the built-up portions of the city.
79,	Killing fowls.
81, 82 & 86,	Slaughtering and yarding cattle, and slaughtering horses.
83, 85,	Using slaughter house for dwelling.
89,	Carting butchers' refuse.
96,	Tanning, skinning, scouring, dressing hides or leather, or offensive or noisome business.
97,	For approval of plans for gas houses.
99 & 100,	Bone boiling, fat burning, gut cleaning, &c., and occupations dangerous or detrimental to health.
102,	Varnish, oil and other business creating unwholesome smoke, odors, &c.
103, 104,	Using offensive matter for filling land.
106,	Fat rendering, &c.
108,	Storing, carting, &c., bones, refuse, &c.
115,	For dirt, &c., to occupy the street.
120,	Removing stable refuse, &c.
121 & 122 & 129,	Emptying privies, &c.
123,	Transporting swill, &c.
130,	Keeping manure piles, &c.
136,	Keeping animals with glanders, &c.
144,	Shipping offal, &c.
160 to 166,	Removal of skins, hides, rags, &c., and as to contagious diseases.
167,	Removals of certain sick persons.
169,	Exposure to disease.
170 & 171 & 174 & 177,	Burial, corpses, &c.
193,	Tolling bells.
190,	Day nursery.
202,	Mineral waters, adopted July 23, 1902.

his
SIMON x LIEBERMAN.
mark.

FRANK MOSS,
Attorney for Relator,
93 Nassau Street, Manhattan, New York City.

CITY AND COUNTY OF NEW YORK, ss:

Simon Lieberman, the relator, being duly sworn, says that the foregoing traverse is true.

his
SIMON x LIEBERMAN.
mark.

Sworn to before me this 29th day of October, 1902.
SAMUEL MARCUS,
Notary Public, N. Y. Co.

I, William M. Fuller, clerk of the court of special sessions of the first division of the city of New York, do hereby certify that the annexed is a copy of all the papers received from the magistrate in the case of The People against Simon Lieberman, defendant, now on file in said clerk's office, and that the same has been compared by me with the original, and is a correct transcript therefrom, and of the whole of said original.

16 Given under my hand and attested by the seal of the said court this 23d day of October, in the year of our Lord one thousand nine hundred and two.

[SEAL.] W. M. FULLER,
Clerk of Court.

First Division, City Magistrate's Court, Third District.

CITY AND COUNTY OF NEW YORK, ss:

In the Name of The People of the State of New York.

To the sheriff of the county of New York, or to any marshal or policeman of the city of New York, or to any peace officer in the county of New York, Greeting:

Whereas, complaint in writing, and upon oath, has been made before the undersigned, one of the city magistrates for the city of New York, by Chas. H. Kilbourne, of No. 969 Sixth avenue, that on the 8th day of October, 1902, at the city of New York, in the county of New York, Simon Lieberman, of 81 Henry street, did, upon a wagon opposite premises No. 43 Delancey street, have, keep, and offer for sale, milk, without a permit from the department of health, in violation of section 66 of the Sanitary Code of the city of New York.

Wherefore, the said complainant has prayed that the said defendant may be apprehended and bound to answer the said complaint.

These are, therefore, in the name of The People of the State of New York, to command you, the said sheriff, marshals and policemen, and each and every of you, to apprehend the said defendant and bring him forthwith before me, at the third district city

17 magistrate's court, in the said city, or in case of my absence or inability to act, before the nearest or most accessible city

magistrate in this city, to answer the said charge, and to be dealt with according to law.

Dated at the city of New York, this 8th day of Oct., 1902.

JOHN B. MAYO,
City Magistrate.

City Magistrate's Court, Third District.

STATE OF NEW YORK, County of New York, } ss.:

Charles H. Kilbourne, of 969 Sixth avenue, in the city of New York, being duly sworn, says: That he is over the age of 21 years, and is a sanitary inspector of the board of health therein, especially detailed to the inspection of milk; that on the 8th day of October, 1902, in a wagon opposite premises No. 43 Delancey street, in the city of New York, the said wagon and the milk thereon being owned by one Simon Lieberman, of 81 Henry street, the said Simon Lieberman did then and there unlawfully keep, have and offer for sale milk, without a permit from the board of health, in violation of the provisions of the Sanitary Code then and there and at all times hereafter in force and operation, and especially in violation of the provisions of a section and ordinance of such Sanitary Code which was duly passed and adopted by the board of health of the department of health of the said city of New York, and by said department of health, at a meeting thereof duly held in said city, on the 16th day of February, 1898, in the manner and language following, to wit:

"Resolved, That under the power conferred by law upon
18 the department of health the following additional section be, and the same is, hereby adopted and declared to form a portion of the Sanitary Code:

"SECTION 66. No milk shall be received, held, kept, offered for sale, or delivered in the city of New York, without a permit, in writing, from the board of health, and subject to the conditions thereof."

That the said ordinance was thereafter duly published once a week for two successive weeks in the *City Record*, a daily newspaper and journal published in the said city, to wit: in the issues of said newspaper of the 3d day of March, 1898, and the 10th day of March, 1898, and that said ordinance was, at the time of the violation therein alleged, in full force and operation in said city of New York.

CHAS. H. KILBOURNE.

Sworn to before me this 8th day of October, 1902.

JOHN B. MAYO,
City Magistrate.

Endorsements.

Witness: Dr. A. K. Smith, 969 6th Ave.

It appearing to me by the within depositions and statements that the crime therein mentioned has been committed, and that there is sufficient cause to believe the within named defendant guilty thereof, I order that he be held to answer the same, and he be admitted to bail in the sum of $100, and be committed to the warden and keeper of the city prison of the city of New York until he give such bail.

Dated Oct. 10, 1902.

JOHN B. MAYO,
City Magistrate.

19 EXHIBIT 1.

October 10, 1902—J. R.

DEPARTMENT OF HEALTH,
6TH AVENUE AND 55TH STREET,
NEW YORK, July 9th, 1902.

Mr. Simon Lieberman, Secaucus, New Jersey.

SIR: At a meeting of the board of health of the department of health of the city of New York, held July 9th, 1902, your permits Nos. 1965 and 1966, to sell and deliver milk in the borough of Manhattan *was* revoked.

By order of the board of health,

C. GOLDMAN, Secretary.

(Copy.)

164 C—1901.

DEPARTMENT OF HEALTH,
6TH AVENUE AND 55TH ST.,
NEW YORK, July 9, 1902.

Mr. Simon Lieberman, Secaucus, New Jersey.

SIR: At a meeting of the board of health of the department of health of the city of New York, held July 9th, 1902, your permits Nos. 1965 and 1966, to sell and deliver milk in the borough of Manhattan, were revoked.

By order of the board of health,

C. GOLDERMAN, Secretary.

20 Secs. 198–200. Form No. 182.

First Division, City Magistrate's Court, —— District.

CITY AND COUNTY OF NEW YORK, *ss:*

SIMON LIEBERMAN, being duly examined before the undersigned, according to law, on the annexed charge, and being informed that it *his* -is right to make a statement in relation to the charge against him; that the statement is designed to enable him, if he see fit, to

answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial.

Question. What is your name?

Answer. Simon Lieberman.

Question. How old are you?

Answer. Forty.

Question. Where were you born?

Answer. Russia.

Question. Where do you live, and how long have you resided there?

Answer. 81 Henry street; one year.

Question. What is your business or profession?

Answer. Milk dealer.

Question. Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation.

Answer. Not guilty.

his
SIMON x LIEBERMAN.
mark.

Taken before me this 9th day of Oct., 1902.

JOHN B. MAYO,
City Magistrate.

21 I have admitted the above-named defendant to bail to answer by the undertaking hereto annexed.

Dated Oct. 10, 1902.

JOHN B. MAYO,
City Magistrate.

Undertaking to Answer.

First Division, City Magistrate's Court, Third District.

CITY AND COUNTY OF NEW YORK, ss:

An order having been made on the 10th day of October, 1902, by John B. Mayo, a city magistrate of the city of New York, that Simon Lieberman be held to answer upon a charge of vio. San. Code, upon which he has been duly admitted to bail in the sum of one hundred dollars, we, Simon Lieberman, defendant, of No. 81 Henry street, occupation, milk, and Samuel Levine, of No. 81 Henry street, occupation, cloaks, surety, hereby undertakes jointly and severally that the above-named defendant shall appear and answer the charge above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court; and, if convicted, shall appear for judgment, and render himself in execution thereof; or if he fail to perform either of these

conditions, that we will pay to The People of the State of New York the sum of one hundred dollars.

his
SIMON x LIEBERMAN.
mark.
SAM'L LEVINE.

Taken and acknowledged before me this 10th day of Oct., 1902.
JOHN B. MAYO,
City Magistrate.

22 CITY AND COUNTY OF NEW YORK, ss:

Samuel Levine, the within named bail and surety, being duly sworn, says: That he is a resident and freeholder within the said county and State, and is worth two hundred dollars, exclusive of property exempt from execution, and over and above the amount of all his debts and liabilities; and that his property consists of the house and lot of land situated at 53 Division street, the title to which is of record in the deponent's name in the office of the register of the city and county of New York; that the same is of the value of not less than $26,000, and is subject to no encumbrances, except a mortgage of $16,000.

SAMUEL LEVINE.

Sworn to before me this 10th day of Oct., 1902.
JOHN B. MAYO,
City Magistrate.

23 Testimony Taken Before Magistrate.

City Magistrate's Court, First Division, Third District.

THE PEOPLE OF THE STATE OF NEW YORK on Complaint of Charles H. Kilbourne
against
SIMON LIEBERMAN.

Before Hon. John B. Mayo, City Magistrate.

Offence Charged: Violation Sanitary Code.

NEW YORK, October 10th, 1902.

Appearances: F. W. Stelle, Esq., assistant corporation counsel, for The People. Frank Moss, Esq., for the defendant.

CHARLES H. KILBOURNE, called as a witness on behalf of The People, being first duly sworn, testifies as follows:

Direct examination by Mr. STELLE:

Q. What is your full name?
A. Charles H. Kilbourne.

Q. Mr. Kilbourne, are you an inspector in the department of health?

A. I am.

Q. On the eighth day of October did you visit the premises 43 Delancey street, in the city of New York?

24 A. I inspected the wagon opposite those premises.

Q. Describe the wagon.

A. It was a large milk wagon, which contained several cans of milk. There was a driver on the wagon, who said his name was Mike Schmidt. I took a sample of the milk from the wagon, and I asked him if he had left milk in this particular store, and if he was selling milk; he said he was. I also went into the store and asked in the store.

Q. Did you subsequently see this defendant?

A. On the same morning I went to his residence at 81 Henry street with another inspector and saw Mr. Lieberman, the defendant.

Q. What is his name?

A. Mr. Simon Lieberman.

Q. What did you do?

A. Asked him if he had received a sample of the milk taken from his wagon that morning, and asked him if Mr. Mike Schmidt was in his employ; he said he was. I also asked him if he had received a notice of the denial of his application for a permit; he said he had.

Q. Are you familiar with his application for a permit?

A. I have the application here, yes; signed Simon Lieberman, by his mark.

By Mr. Moss:

Q. Was this in your presence?

A. No, sir.

By Mr. Stelle:

Q. Was there a permit number on the wagon that you saw?

A. I think there was a wagon permit—number 1966.

Q. Was that permit revoked by the department of health?

A. Yes.

25 Mr. Stelle: I offer in evidence certificate of the secretary of the board of health as to the revocation of permit number 1966 on July 9th.

(Same admitted and marked in evidence Exhibit 1, October 10th, 1902.)

By Mr. Stelle:

Q. Subsequent to the revocation of that permit was there an application made for a renewal of it?

A. There was.

Mr. Moss: I object to that, as no application for renewal is shown.

Mr. Stelle: I offer the application in evidence.

Mr. Moss: I object to that as not being proved.
The MAGISTRATE: Objection sustained.
Mr. Moss: I move that the last answer be stricken out.
The MAGISTRATE: Motion granted.

By the MAGISTRATE:

Q. You do not know whether he signed that paper, or made his mark, do you?
A. I didn't see him do it.
Q. You do not know whether he did or not?
A. No; not of my own knowledge.

Cross-examination by Mr. Moss:

Q. You have charge of this prosecution, have you?
A. In this particular case; yes, sir.
Q. What is your position in the board of health?
A. Inspector.
Q. Is this official business of the board of health?
A. Yes, sir.
26 Q. You were directed by your superiors in the board in this case?
A. Yes, sir.
Q. And you report to your superior about it?
A. I do.
Q. Have you had any conversation with the commissioner of health, Doctor Lederle, the official in charge, about this case, or any other case?
A. Not with the commissioner, no.
Q. You say that the defendant had a permit number 1966?
A. There was a sign on the wagon, 1966.
Q. And you say that permit was revoked on the ninth of July?
A. Yes, sir.

By Mr. STELLE:

Q. Was anyone with you at the time of your call on Mr. Lieberman?
A. Yes, sir; Doctor Smith—A. K. Smith.

A. K. SMITH, called as a witness on behalf of The People, being first duly sworn, testifies as follows:

Direct examination by Mr. STELLE:

Q. Are you an inspector in the department of health?
A. I am.
Q. Did you go with Mr. Kilbourne to see this defendant on the eighth day of October?
A. I did.
Q. You heard the conversation between Mr. Kilbourne and the defendant?

A. I did.
Q. What was that conversation?
A. He asked Mr. Lieberman if he got the notice from the
27 board of health that his permit was revoked, and he said he did. He asked him if Mike Schmidt was his driver in his employ, and he said he was.

By the MAGISTRATE:

Q. Is that all that you recall?
A. They had some conversation about the standing of the milk, and so forth, and he said it stood well.

By Mr. Moss:

Q. Who was it that said it stood well?
A. Mr. Kilbourne.
Q. Dr. Kilbourne?
A. Yes, sir.

By Mr. STELLE:

Q. What was that, the quality of the milk?
A. The quality of the milk; yes, sir.

Mr. STELLE: As long as objection has been made to the introduction of this application for a permit, I will have to ask that the case be adjourned, on the ground that the permit clerk is on his vacation.

Mr. Moss: You have proved that he has admitted that he received a notice of the revocation of the permit and a notice of the denial of his application. Isn't that all you want?

Mr. STELLE: We have not any admission in there that he received notice of the revocation.

Mr. Moss: I will concede upon the record that, prior to the eighth day of October, 1902, he received notice from the board of health that his permit number 1966 had been revoked?

28 Mr. STELLE: I offer in evidence section 66 of the Sanitary Code, which provides as follows:

No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit in writing from the board of health, and subject to the conditions thereof.

It is admitted that prior to July 9th, 1902, the defendant, Simon Lieberman, was in possession of a permit from the board of health, number 1966, for the sale of milk from the wagon testified to herein.

Mr. Moss: The defendant moves to dismiss the complaint, upon the ground that section 66 of the Sanitary Code offered in evidence is without authority; it is unconstitutional, and entirely outside of the authority granted by the legislature to the board of health.

The MAGISTRATE: The motion is denied.

Mr. Moss: We will waive further examination, and under all the circumstances I ask that the bond be as small as is consistent with your honor's best judgment.

Testimony closed.

Sections of the Sanitary Code.

SEC. 44. That no meat, fish, birds or fowl, fruit or vegetables, nor any milk, not being then healthy, fresh, sound, wholesome, and safe for human food, nor any meat or fish that died by disease or accident, shall be brought within said city, or offered or held for sale in any public or private market, as such food, anywhere in said city.

SEC. 51. That no meat, fish, fruit, vegetables or milk, or unwholesome liquid, shall knowingly be bought, sold, held, offered for sale, labeled, or any representation made in respect thereof, under a false name or quality, or as being what the same is not, as respects wholesomeness, soundness, or safety for food or drink.

SEC. 56. That upon any cattle, milk, meat, birds, fowl, fish or vegetables, being found by any inspector or other officer of this department in a condition which is, in his opinion, unwholesome and unfit for use as human food, or in a condition or of a weight or quality in this code condemned or forbidden, he is empowered, authorized and directed to immediately condemn the same and cause it to be removed to the offal or garbage dock for destruction, and report his action to the department without delay.

SEC. 59. That no person shall have at any place where milk, butter or cheese is kept for sale, nor shall at any place sell, deliver, or offer or have for sale, or keep for use, nor shall any person bring or send to said city any unwholesome, skimmed, watered or adulterated milk, or milk known as "swill-milk," or milk from cows or other animals that for the most part have been kept in stables or that have been fed, in whole or in part, on swill, or milk from sick or diseased cows or other animals, or any butter or cheese made from any such milk, or any unwholesome butter or cheese.

SEC. 63. No milk which has been watered, adulterated, reduced or changed in any respect by the addition of water or other substance, or by the removal of cream, shall be brought into, held, kept, or offered for sale at any place in the city of New York; nor shall any one keep, have or offer for sale in the said city any such milk.

The term "adulterated," when so used in this section, means:

First. Milk containing more than eighty-eight per centum of water or fluids.

Second. Milk containing less than twelve per centum of milk solids.

Third. Milk containing less than three per centum of fats.

Fourth. Milk drawn from animals within fifteen days before or five days after parturition.

Fifth. Milk drawn from animals fed on distillery waste, or any substance in a state of fermentation or putrefaction, or on any unhealthy food.

Sixth. Milk drawn from cows kept in a crowded or unhealthy condition.

Seventh. Milk from which any part of the cream has been removed.

Eighth. Milk which has been adulterated with water or any other fluid, or to which has been added, or into which has been introduced, any foreign substance whatever.

SEC. 64. Any milk found to be adulterated, either by the addition of water or other substance, or by the removal of cream, or which has been brought into, or is held or offered for sale, in the city of New York, may be seized and destroyed by any inspector or other officer of this department authorized to inspect milk.

SEC. 65. No condensed milk which is adulterated shall be brought into, held, kept or offered for sale at any place in the city of New York, nor shall any one have, keep or offer for sale in said city any such condensed milk. The words "condensed milk" mean pure milk from which any part of the water has been removed, or pure milk from which any part of the water has been removed and to which sugars have been added. The term "adulterated," when used in this section, refers to condensed milk in which the amount of fat is less than twenty five per cent. of the milk solids contained therein, or to which any foreign substance whatever has been added, excepting sugars, as in preserved milks.

SEC. 66. No milk shall be received, held, kept, offered for
31 sale or delivered in the city of New York without a permit in writing from the board of health and subject to the conditions thereof.

SEC. 67. No cream that is adulterated shall be brought into, held, kept or offered for sale in the city of New York, nor shall any one keep, have or offer for sale in said city any such cream. The term "cream" means the fatty portions of pure milk which rise to the surface when the milk is left at rest, or which is separated by other means. The term "adulterated," when used in this section, refers to cream to which any foreign substance whatever has been added.

SEC. 88. That every butcher or milk dealer, and their agents, shall allow the parties authorized by this department to freely and fully inspect their cattle and meats, fish and vegetables, held, offered or intended for sale, and will be expected to answer all reasonable and proper questions asked by such persons relative to the condition thereof, and of the places where such articles may be.

Reply to Traverse to Return.

Supreme Court, New York County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Simon Lieberman
against
JOHN E. VAN DE CARR, Warden of the City Prison of the City of New York.

The respondent above named hereby denies each and every

32 allegation set forth in the relator's traverse to the respondent's return in the above-entitled proceeding.

Dated New York, October 29th, 1902.

GEORGE L. RIVES,
Corporation Counsel.

WM. TRAVERS JEROME,
District Attorney.

Stipulation Used on Hearing Before Supreme Court Justice.

N. Y. Supreme Court.

THE PEOPLE *ex Rel.* SIMON LIEBERMAN
vs.
JOHN E. VAN DE CARR.

Upon the hearing of this special proceeding it is stipulated:

I. That the copies of papers and proceedings before Magistrate John B. Mayo, and also the record of the testimony taken before said magistrate; and also the copies of sections 44, 51, 56, 59, 63, 65, 67 and 88 of the Sanitary Code, all annexed to the traverse of the return, are correct and true, and that no other testimony was taken, except that which is attached to the traverse.

II. It is stipulated further that the only sections of the Sanitary Code requiring permits of the board of health are the following:

33 21, 26, 42, 43, 62, 66, 69, 70, 72, 73, 76, 78, 79, 80, 81, 82, 85, 86, 89, 96, 97, 99, 100, 102, 103, 104, 106, 108, 115, 120, 121, 122, 123, 129, 130, 136, 144, 160, 161, 162, 163, 164, 165, 166, 167, 169, 170, 171, 174, 177, 190, 193, 202, which was adopted on July 23, 1902.

Dated Oct. 29, 1902.

FRANK MOSS,
Attorney for Relator.
GEO. L. RIVES,
Corporation Counsel.
WM. TRAVERS JEROME,
District Attorney.

There was offered and received in evidence the sections of the Sanitary Code referred to in the stipulation, a summary of which now appears, the summary being consented to as embodying all of the requirements for permits.

N. Y. Supreme Court.

THE PEOPLE *ex Rel.* SIMON LIEBERMAN
against
JOHN E. VAN DE CARR.

Stipulation.

It is stipulated that the following is a summary of the permit sections of the Sanitary Code, said summary embracing all the parts of said sections that have reference to the issuing of permits by the department of health:

34 Permit Sections of the Sanitary Code, New York City.

SEC. 21. No person shall use a *smoke house* or room or apparatus in a *tenement* or lodging-house without a permit.

SEC. 26. That for all *lodging houses* a permit in writing shall be required.

SECS. 42, 43. Privy and manure vaults and cesspools must not be built unless unavoidable, and then in accordance with terms of a permit issued by the board.

SEC. 62. Water from wells shall not be used except under a permit.

SEC. 66. (This is the milk permit section.)

SEC. 69. No *pigs*, *swine* or *cattle* shall be *unloaded* upon any street or public place, except pursuant to a written permit. (Such animals may not be driven during certain hours except by permit.) (Section 78 refers to this permit.)

SEC. 76. No *cattle* shall be *led* or *driven* on the street without a permit.

SEC. 70. No person shall allow any *swine* or *goat* to *run* at large, or shall keep such animal in the built-up portions without a permit.

SECS. 72 and 80. No *cows* shall be kept without a permit.

SEC. 73. No *cattle*, *swine*, *sheep*, *geese*, *goats* or *horses* shall be *yarded* within or adjacent to built-up portions of city without a permit.

SEC. 79. No live chickens, geese, ducks or other fowls shall be brought into or kept or held or offered for sale or killed without a special permit.

SECS. 81 and 86. Slaughtering, and keeping slaughter-houses, and the yarding of cattle in new places, shall not be done without a permit.

SEC. 82. No buildings shall be erected or converted or used as *slaughter-houses*, or for fat rendering, or other offensive business, until the plans have been approved by the board of health.

35 There shall be no *slaughtering* in Bronx, Queens and Richmond without a permit, nor in Brooklyn, in new places.

SEC. 85. No building or lot used for purposes of slaughtering shall be occupied for dwelling except with special permit.

SEC. 89. No *offal, fat* or *butcher's refuse* shall be brought into the city or conveyed over any ferry without a permit.

SEC. 96. No establishment for *tanning, skinning, scouring* or *dressing hides* or *leather*, or for any *offensive* or *noisome business*, shall be carried on without a permit.

SEC. 97. No building shall be erected, converted or used for the manufacture of gas until the plans have been submitted and approved.

SEC. 99. That no person shall boil any offal, swill, bones or fat in the built-up portions of said city, save in ordinary cooking, nor shall the business of bone crushing, bone boiling, bone grinding, bone burning, shell burning, fat burning, gut cleaning, nor the skinning or making of glue from any dead animals, or parts thereof, nor any other occupation that is dangerous or detrimental to life or health, be hereafter established within said city; and no business or pursuit of the kind in this section named shall be carried on anywhere in said city, unless the same be allowed by a permit from the department of health.

SEC. 100. That no person shall boil, heat, dry, keep, store or manufacture any offal, swill, blood, bones, fat, tallow or lard, or any decaying animal or vegetable matter, nor shall the business of bone crushing, bone boiling, bone grinding, bone or shell burning, lime making, gut cleaning, skinning or making glue from any part of dead animals, heating, drying, storing, shipping or transporting any blood, scrap, fat, grease, or offensive animal or vegetable matter, or manufacturing materials for manure, be allowed or conducted in
36 the city of New York, or in its waters, without a special permit from this department, to be applied for in writing, specifying the nature and precise location of the proposed business.

SEC. 102. No person shall erect any manufactury for boiling varnish or oil or distilling spirits, or for making lampblack, turpentine or tar, or for any other business that generates any unwholesome, offensive or deleterious gas, smoke, deposit or exhalation without a permit.

SEC. 103. No offensive matter shall be used for filling land, unless pursuant to a special permit.

SEC. 104. No ground that will emit an offensive smell or deleterious odor shall be opened or turned up, except according to a permit.

SEC. 106. All fat rendering, and the handling of the materials thereof, must be in accordance with a special permit.

SEC. 108. No person shall gather or handle any bones, refuse or offensive material without a permit.

SEC. 115. No person shall *deposit* upon any *street* or *public place* in the generally built-up portion of the city, or upon any *paved street*, any *dirt, brick* or *other material*, in such manner as to occupy more than 100 square feet, nor allow the same to remain more than twelve hours, without a permit.

SEC. 120. It shall not be lawful to remove manure and stable refuse in carts or wagons or to cart the same within the city limits with-

out a permit from the board of health, and such carts and wagons shall be of a construction approved by said board, and every such cart or wagon must have a permit from the board in writing and be used in accordance with the terms of such permit, and not otherwise. * * * Manure and stable refuse shall not be unloaded or deposited within the city limits, except upon the conditions of a permit in writing, and at such dock and places as shall be approved and to which a permit has been granted. * * * No manure
37 vault or receptacle shall be built or used on any premises within the built-up portions of the city, nor in any other part, except pursuant to the terms of a permit.

SEC. 121. No person shall empty, or attempt to empty, any vault, sink, privy or cesspool, except pursuant to a permit therefor.

SECS. 122 and 129 provide that *removal* and *carting* of *contents* of *privy*, &c., shall be in a certain way and by permit.

SEC. 123. No person shall engage in the *business* of *transporting manure, swill, offal* or any *offensive* or *noxious substance*, or in driving any cart for such purpose, until he shall have first received a permit.

SEC. 130. No *pile* or *deposit or accumulation* of *manure, offal, dirt* or *garbage*, or *nauseous substance* shall be made in the built-up portion of the city, or upon any open space enclosed within any portions thereof, or upon the piers, docks or bulkheads adjacent thereto, &c., except according to a resolution and a permit. * * * Nor shall any straw, hay or other bedding for animals be dried upon any street, &c.; nor shall any hay, straw or other substance, or the contents of any bed or mattress, be deposited or burnt or accumulated within 200 feet of any street, without a permit.

SEC. 136. No person shall keep any horse, ass or colt having glanders or farcy, but shall report to the board of health, and remove the animal as directed. No animal with said disease, or any contagious disease, or that shall die thereof, shall be removed, disposed of or exposed in any street or public place, without a written permit.

SEC. 144. No vessel shall be taken or be allowed to come into any dock, &c., for the purpose of shipping or removing offal, garbage, rubbish, blood or offensive matter, dirt or dead animals, &c., without a permit.

38 SEC. 100. No person shall bring to any dock, &c., or within 1,000 feet thereof, or unload or have in storage in the built-up portions, any skins, hides, rags or similar articles, from any point south of Norfolk, without a permit.

SEC. 161. No person shall unload such cargo without a permit.

SEC. 162. No person shall remove any person sick, or that has been exposed to, or is liable very soon to, develop any contagious disease, or remove any article that has been exposed to contagion, except in accordance with a permit.

SEC. 163. No person shall bring any vessel, person or article therefrom, from an infected port, or liable to quarantine, nearer than 300 yards to any dock, pier or building without a permit.

SEC. 167. No person shall carry or remove any person sick of any infectious or contagious disease without a permit.

SEC. 169. No school principal or parent or custodian of a child having, or lately having, infectious or contagious disease shall allow it to attend school without permission.

SEC. 170. No interment of a dead body shall be made without a permit.

SEC. 171. No new burying ground shall be established, nor shall any grave or graveyard be opened, exposed or disturbed without a permit.

SEC. 172. No person shall convey any dead body without a permit.

SEC. 177. No person shall keep a dead body unburied more than four days (or twenty-four hours in contagious diseases) without a permit.

SEC. 190. No day nursery shall be conducted without a permit.

SEC. 193. No large or church bell shall be tolled at any funeral without a permit.

SEC. 202. It shall be the duty of every manufacturer, im-
39 porter, or other person who manufactures or imports, in the city of New York, any artificial or natural mineral, spring or other water for drinking purposes, to file, under oath, with the department of health, the name of such water and the exact location from which it is obtained, together with the chemical and bacteriological analysis thereof, and when manufactured; the exact formula used in its production, given qualitatively and quantitatively each and every item entering into its composition. No person shall manufacture or bottle mineral, carbonated or table waters in the city of New York without a permit from the department of health.

Order Dismissing Writ.

At a special term, part II, of the supreme court, held in and for the county of New York, at the county court house, in the city of New York, borough of Manhattan, on the 3d day of December, 1902.

Present: Hon. Alfred Steckler, justice.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* Simon Lieberman, Relator,
against
JOHN E. VAN DE CARR, Warden of the City Prison, Respondent.
} Resettled Order.

Upon reading and filing the petition of Samuel Marcus, in
40 behalf of Simon Lieberman, verified the 22d day of October, 1902, the writ of *habeas corpus*, duly allowed herein by the Honorable Alfred Steckler, justice, on the 22d day of October, 1902, the return to said writ of *habeas corpus*, duly made by John E. Van de Carr, warden of the city prison, with a true copy of the commit-

ment therein recited, and the traverse to said return, and the reply to said traverse, and the stipulation and sections of the Sanitary Code offered in evidence; and the said relator, Simon Lieberman, having been duly produced in open court in obedience to said writ of *habeas corpus;*

And after hearing Frank Moss, Esq., of counsel for the relator, in support of said writ, and Frederick W. Stelle, Esq., assistant corporation counsel, and Henry G. Gray, Esq., assistant district attorney, in opposition thereto; and on the proceedings had before said justice;

Now, on motion of William Travers Jerome, district attorney of New York county, and George L. Rives, corporation counsel of the city of New York, it is

Ordered, that the said writ be, and the same hereby is, dismissed; and it is

Further ordered, that the said relator, Simon Lieberman, be, and he hereby is, remanded to the custody of the said respondent, warden of the city prison.

It is further ordered that this order be entered *nunc pro tunc* as of November 25th, 1902, the date of the order heretofore entered herein.

Enter.

A. S., J. S. C.

41 SIR: Please take notice, that within is a copy of an order this day duly entered in the office of the clerk of the supreme *clerk*, New York county, in the within-entitled proceeding.

Dated New York, December 3d, 1902.

GEORGE L. RIVES,
Corporation Counsel, 119 Nassau Street, New York City.

To Frank Moss, Esq., attorney for relator, 99 Nassau street, New York city.

42 Notice of Appeal.

Supreme Court of the State of New York, Appellate Division, First Department.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* SIMON LIEBERMAN, Relator and Appellant,
against
JOHN E. VAN DE CARR, Warden of the City Prison, Respondent.

Please take notice, that the above-named relator hereby appeals to the appellate division of the supreme court of the State of New York, first department, from the order dated December 3d, 1902, and duly entered in the above-entitled proceeding on said day in the

office of the clerk of the county of New York, and from each and every part of said order.

Dated New York, December 5, 1902.

FRANK MOSS,
Att'y for Relator and Appellant, 93 Nassau Street, N. Y. C.

To Hon. George L. Rives, corporation counsel; Hon. Wm. Travers Jerome, dist. att'y; the clerk of the county of New York.

43 Opinion.

STECKLER, J.:

People *ex rel.* Lieberman *v.* Van de Carr, warden, &c.—The relator was arrested for selling milk without a permit, in violation of section 66 of the Sanitary Code of the board of health, and is now in custody pending trial for the offence. His release is sought by *habeas corpus* on the ground that the said ordinance is unconstitutional and outside of the authority granted by the legislature to the board of health. A careful consideration of the able and exhaustive argument of the learned counsel for the relator fails to convince me of the soundness of his objections. In January, 1896, the ordinance in question existed as section 221 of the Sanitary Code. Section 1172 of chapter 378 of the Laws of 1897 (charter of Greater New York) made the said code binding and in force in the enlarged city, and empowered the board of health to alter, amend or annul any part of said code, and publish therein additional provisions for the security of life and health in the city of New York. The said code was also confirmed by section 1172 of the amended charter (L. 1901, chap. 466), which further authorized the board of health to embrace in the Sanitary Code all matters and subjects to which and so far as the power and authority of the department of health extends, not limiting their application to the subject of health only; and provided that any violation of said code should be treated as a misdemeanor. The ordinance in question, therefore, derived its authority from the legislature, not merely from the municipal board which passed it, and thus, within the prescribed limits, has the force and effect of a legislative act (McDermott *v.* Board of Police, 5 Abb. Pr., 422; Polinsky *v.* People, 73 N. Y., 65), and is a valid exercise of the police power of the legislature to pass such laws or ordinances as may be necessary for the preservation of the health of the people
44 (People, &c., *v.* The Warden, 144 N. Y., 529). It does not follow that, because the ordinance under consideration is more drastic than any provision of the State agricultural law, it must therefore be invalid; for the means that may be effective in other parts of the State in detecting adulterated milk may well be inadequate for that purpose in the great city of New York. As the preponderance of medical opinion seems to be that milk may, under certain conditions, be an important factor in spreading dangerous diseases, an intelligent regulation of the milk business with a view to

the public health is of prime importance to the community. Section 66 of the Sanitary Code prevents no one from selling milk in the city unless unsanitary conditions exist at the farms from which the milk is obtained, or at the places where it is sold. It does not exact a charge for the permit or discriminate in favor of any class of persons, but simply requires the observance of reasonable sanitary regulations by those engaged in the business. As, in my opinion, the ordinance is valid and reasonable, the writ must be dismissed and the prisoner remanded.

45 Order of Affirmance.

At a term of the appellate division of the supreme court of the State of New York, first department, held at the court house thereof, in the county of New York, on the 20th day of March, 1903.

Present: Hon. Charles H. Van Brunt, P. J.; Hon. Morgan J. O'Brien, Hon. George L. Ingraham, Hon. Chester B. McLaughlin, Hon. Frank C. Laughlin, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* SIMON LIEBERMANN, Appellant,
against
JOHN E. VANDECARR, Warden of the City Prison, Respondent.

The above-named relator, Simon Liebermann, having appealed to the appellate division of the supreme court of the State of New York, first department, from the order entered in the office of the clerk of the county of New York on the 3d day of December, 1902, dismissing the writ of *habeas corpus* granted herein on the 22d day of October, 1902; and said appeal coming on to be heard, after hearing Frank Moss, Esq., attorney for the said relator, in support of said appeal, and Frederick W. Stelle, Esq., of counsel for the re-
46 spondent, in opposition thereto, and due deliberation being had thereon,

On motion of George L. Rives, corporation counsel of the city of New York, it is hereby unanimously

Ordered, that the said order be, and the same hereby is, affirmed. Ent.

C. H. V. B., P. J.

Judgment of Affirmance.

Supreme Court of the State of New York, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* SIMON LIEBERMANN, Appellant,
against
JOHN E. VANDECARR, Warden of the City Prison, Respondent.

The above-named relator, Simon Liebermann, having appealed to the appellate division of the supreme court of the State of New York,

first department, from the order entered in the office of the clerk of the county of New York on the 3d day of December, 1902, dismissing the writ of *habeas corpus*, granted herein on the 22d day
47 of October, 1902; and said appeal having come on to be heard before said appellate division; and the said appellate division having, by order bearing date the 20th day of March, 1903, unanimously affirmed the order so appealed from;

On motion of George L. Rives, corporation counsel of the city of New York, it is hereby

Adjudged and decreed, that the order be, and the same hereby is, affirmed.

Dated New York, March 31, 1903.

(S'g'd) THOMAS L. HAMILTON, Clerk.

Notice of Appeal.

Court of Appeals, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* SIMON LIEBERMAN, Appellant,
against
JOHN E. VAN DE CARR, Warden of the City Prison, Respondent.

Please take notice, that Simon Lieberman, the relator, appeals to the court of appeals of the State of New York from the order of the appellate division of the supreme court of the State of New
48 York, first department, dated the 20th day of March, 1903, and from the judgment of affirmance entered upon said order in the office of the clerk of the county of New York on March 31st, 1903, which order and judgment affirmed an order of the supreme court of the State of New York, entered in the office of the clerk of the county of New York on the 3d day of December, 1903; and from each and every part of said order and judgment.

Dated New York, April 20th, 1903.

FRANK MOSS,
Att'y for Appellant, 93 Nassau Street, New York City.

To George L. Rives, Esq., corporation counsel; William Travers Jerome, Esq., district attorney; Alfred Wagstaff, Esq., clerk appellate division, supreme court, first department; Thomas L. Hamilton, Esq., clerk county of New York.

49 Opinion Appellate Division.

LAUGHLIN, J.:

The relator was arrested on a warrant issued by a magistrate charging him with a violation of section 66 of the Sanitary Code. On being arraigned, he pleaded not guilty; and on the preliminary hearing before the magistrate he was held to answer for the crime, and a commitment was issued committing him to the custody of the

warden and keeper of the city prison in default of bail, which had been fixed at $100. After giving bail he was surrendered by the sureties, whereupon he sued out the writ of *habeas corpus*.

The relator was a milk dealer, and prior to the 9th day of July, 1902, he held two permits—presumably for two wagons, but the fact does not appear—from the board of health under section 66 of the Sanitary Code, which provides as follows:

"SEC. 66. No milk shall be received, held, kept, offered for sale or delivery in the city of New York without a permit, in writing, from the board of health, and subject to the conditions thereof."

These permits were revoked on that day by resolution of the board. The relator again applied for permits under that section, but his application was denied. Neither the grounds of revocation nor of the denial of the second application were shown.

In the absence of evidence to the contrary, it will be presumed that the facts warranted the action of the board in revoking the permits and in declining to issue new permits (People *ex rel.* Nechamous *v.* Warden, etc., 144 N. Y., 529; 39 N. E., 686, 27 L. R. A., 718); and this is not seriously questioned by the relator, his contention being that said section 66 of the Sanitary Code is unconstitutional and void. This section of the Sanitary Code was adopted by the board of health on the 16th day of February, 1898, but prior to that time it had existed as section 221 of the Sanitary Code
50 adopted on the 21st day of January, 1896. The adoption of said section 221 of the Sanitary Code was expressly ratified and continued in force, except as the same might be revised, altered, amended, or annulled by the board, by section 1172 of the Greater New York charter (page 418, c. 378, Laws 1897). By said section 1172 and section 1168 of the Greater New York charter, the board of health was authorized and empowered to add to or alter, amend, or annul any part of the Sanitary Code. The board of health merely re-enacted this section as it formerly existed, giving it a different number and after that the legislature, by section 1172, p. 499, c. 466, of the Laws of 1901, declared that the Sanitary Code "which shall be in force in the city of New York the first day of January, 1902, and all existing provisions of law for fixing penalties for violations of said code are hereby declared to be binding and in force in the city of New York, and shall continue to be so binding and in force, except as the same may be from time to time revised, altered, amended or annulled as herein provided. * * * The board of health may embrace in said Sanitary Code all matters and subjects to which and so far as the power and authority of said department of health extends, not limiting their application to the subject of health only. Any violation of said Sanitary Code shall be treated and punished as a misdemeanor." Section 66 of the Sanitary Code, having been enacted prior to the adoption of this provision of law by the legislature, and having remained unaltered on the 1st day of January, 1902, was thereby ratified by the legislature, and became a valid ordinance, even though its validity on account of any

irregularity in or want of authority for its enactment was open to question before. (People *v.* Davis (Sup.) 79 N. Y. Supp., 747.)

The relator's point, therefore, resolves itself into the question as to whether it was competent for the legislature to expressly
51 authorize the enactment of this ordinance. His counsel contends that it is apparent on the face of the ordinance that it is unreasonable and void, in that it makes it unlawful for hotels, or even private consumers, to have milk in their possession in this city without a permit from the board of health. It may be observed—although the question is not presented for judicial determination—that the ordinance appears to have been designed to require only those dealing in milk to obtain such a permit (People *v.* Timmerman, 79 App. Div. —, 80 N. Y. Supp., 285), and it would seem to be susceptible of the construction that it is intended as a regulation of those offering milk for sale, rather than of consumers. Nevertheless, the relator was a dealer in milk, and it appears that he offered milk for sale after his permits were revoked. If the legislature can require those dealing in milk to obtain a permit, but the act would be unconstitutional if extended to consumers, the ordinance should be construed as applicable to the former only, in order to sustain its validity. People *ex rel.* Nechamcus *v.* Warden, etc., *supra*. The authority of the legislature to require those dealing in milk and other food products that are liable to become deleterious to health to obtain licenses under reasonable regulations designed to secure the health of the community is amply sustained by the decisions, and it will be presumed that the facts warranted such legislation. People *ex rel.* Larrabee *v.* Mulholland, 82 N. Y., 324, 37 Am. Rep., 568; City of Chicago *v.* Bartee, 100 Ill., 57; Mayor, etc., *v.* D. D., E. B. & B. R. R. Co., 133 N. Y., 104, 30 N. E., 563, 28 Am. St. Rep., 609; People *v.* West, 106 N. Y., 293, 12 N. E., 610, 60 Am. Rep., 452.

This ordinance was enacted under the police power of the State, and the test of the validity of statutes and ordinances thus enacted is whether they are reasonable. City of Brooklyn *v.* Nassau El. R. R. Co., 38 App. Div., 365, 56 N. Y. Supp., 609; Barry *v.* Village of Port Jervis, 64 App. Div., 268, 72 N. Y. Supp., 104. The
52 validity of a law or ordinance, however, does not depend upon what has been done or may be done by officials acting thereunder arbitrarily or in disregard of their duty, but upon what may be done lawfully thereunder. People *ex rel.* Nechamcus *v.* Warden, etc., *supra;* City of Rochester *v.* West, 164 N. Y., 510, 58 N. E., 673, 53 L. R. A., 548, 79 Am. St. Rep., 659; Gunning System *v.* City of Buffalo, 75 App. Div., 31, 77 N. Y. Supp., 987; Barry *v.* Village of Port Jervis, *supra;* Gundling *v* Chicago, 177 U. S., 183, 20 Sup. Ct., 633, 44 L. Ed. 725. It is manifest that dealing in milk cannot be too carefully regulated in a great city, and it was clearly lawful for the legislature itself to prohibit, or vest the board of health with authority to enact an ordinance prohibiting, any person from dealing in milk without first obtaining a license under reasonable conditions and restrictions with reference to the source of supply, the manner of transporting and keeping the milk, and such

supervision of the same as may tend to insure the delivery of wholesome milk to consumers, who are helpless to protect themselves in this regard. Such regulations, however, should be uniform, and the board should not act arbitrarily; and, if this section of the Sanitary Code vested in them arbitrary power to license one dealer in a lawful commodity and refuse a license to another similarly situated, undoubtedly it would be invalid (Yik Wo *v.* Hopkins, 18 U. S. 356, 6 Sup. Ct., 1064, 30 L. Ed., 220; Gundling *v.* Chicago, 177 U. S., 183, 20 Sup. Ct., 633, 44 L. Ed., 725; Noel *v.* People, 187 Ill., 587, 58 N. E., 616, 52 L. R. A., 287, 79 Am. St. Rep., 238; Dunham *v.* Trustees of Rochester, 5 Cow., 462; Brooklyn *v.* Breslin, 57 N. Y., 591); but such was not its purpose, nor is that its fair construction.

It is unnecessary now to determine whether the action of the board in refusing or revoking such a permit would be judicial, and thus reviewable by mandamus or certiorari, or whether, if the authority should be arbitrarily or improperly exercised, the
53 only remedy would be an application for the removal of the officers; for those are questions that may arise in the administration of the law, but do not go to its validity. The section, properly construed, does not permit unjust discrimination, and, therefore, it is valid.

It follows, therefore, that the order should be affirmed. All concur.

Waiver of Certification.

Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* SIMON LIEBERMAN, Relator-Appellant,
against
JOHN E. VAN DE CARR, Warden of the City Prison of the City of New York, Respondent.

It is hereby stipulated that the foregoing are correct copies of the petition of a writ for *habeas corpus*, the return thereto and the traverse thereof, and the reply to said traverse, and of all the evidence and papers taken and passed on before the magistrate, and on the hearing before the justice of the court below, and of the order dismissing said writ, and of the notice of appeal therefrom, and
54 of the order and judgment of affirmance and of the notice of appeal from said order and judgment, and of the opinions herein, and of all papers herein on file in the office of the clerk of the court; and certification of the same, pursuant to section 3301 of the code, or otherwise, is hereby waived.

Dated N. Y., May 2, 1903.

FRANK MOSS,
Attorney for Appellant.
GEORGE L. RIVES,
Corporation Counsel.
WM. TRAVERS JEROME,
District Attorney.

55 THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* SIMON Lieberman, Appellant,
v.
JOHN E. VANDECARR, Warden of the City Prison, Respondent.

Opinion of the Court of Appeals, State of New York.

Frank Moss for appellant; George L. Rives, corporation counsel (Theodore Connoly of counsel), for respondent.

BARTLETT, J.:

The relator Lieberman was arrested on the 8th day of October, 1902, for a violation of section 66 of the Sanitary Code of the Board of Health of the Health Department of the City of New York, which violation is made by section 1172 of the charter of the city of New York a misdemeanor.

Section 66 of the Sanitary Code reads: "No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit in writing from the board of health and subject to the conditions thereof."

It is admitted that relator sold milk without a permit, as alleged.

It is conceded that this appeal, the relator having been arrested, held for trial, and sued out a writ of *habeas corpus*, presents the single question of law as to the constitutionality of the section quoted.

It is argued that this section on its face is violative of section 1, article 1, of the State constitution, reading: "No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

It is claimed also that it infringes section 1 of the fourteenth amendment of the Federal Constitution, providing: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The appellant also makes the point that even if this section be deemed constitutional it is invalid, because it is an unreasonable and arbitrary assumption of power that was not granted to the local board of health by the legislature.

This section, with slight changes in phraseology, has been a part of the statute law since the year 1865, and in some modified form during the existence of the State.

The courts have regarded the principle involved as a proper and necessary municipal regulation, sanctioned by the police power.

In Metropolitan Board of Health *v.* Heister (37 N. Y., 661), where the act to establish a metropolitan sanitary district was held to be

constitutional, the following language was used by the court, after pointing out various acts from 1784 to 1866, enacted in the exercise of the police power for the protection of the public health: "These acts show that, from the earliest organization of the government, the absolute control over persons and property, so far as the public health was concerned, was vested in boards or officers who exercised a summary jurisdiction over the subject, and who were not bound to wait the slow course of the law; and that juries had never been used in this class of cases. The governor, the mayor, health officers under various names, were the persons intrusted with the execution of this important public function; and they were always empowered to act in a summary manner. Scarcely a year passes, or did pass, prior to 1846, in which the legislature did not charter some city or village, and give to the local powers full authority, by their own action and in their own way, to regulate, abate or remove all trades or manufactures that might be by them deemed injurious to the public health. I have examined the statutes from 1832 onward, and find that scarcely a year passed by in which these powers were not given to many cities or villages by original authority or by amendments to their charters. I see, among the laws of the session just closed, several of the same character, among them one to incorporate the village of Gouverneur, which gives the trustees full power to prohibit and abate nuisances, to compel the owners of a butcher's stall, sewer, privy, or other unwholesome thing, to cleanse the same, or cause the same to be removed, or otherwise disposed of, as may be necessary for the public good (see, also, 15 Wend., 262)."

The section we are called upon to construe is a part of the Sanitary Code which has legislative and legal sanction. It is recognized and adopted by the original and amended charter of the city of New York (secs. 1172–1168).

The Sanitary Code is a gradual growth and made up, in part, of laws and ordinances enacted during a period of many years, invoking the exercise of the police power for the protection of the public health.

It contains about fifty sections providing for the issuing of permits regulating the conduct of business and the vending of food.

It has at least ten sections regulating, among other things, the quality of milk to be offered to the citizen and the details involved in the sale thereof.

In the case of Polinsky *v.* People (73 N. Y., 65), at page 69, Judge Andrews said: "That the legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends, is not an open question. This power has been repeatedly recognized and affirmed (Metropolitan Board of Health *v.* Heister, 37 N. Y., 661; Health Department *v.* Knoll, 70 N. Y., 530; People *ex rel.* Cox *v.* The Justices of Special Sessions, 7 Hun, 214). And ordinances designed to prevent the sale

of adulterated milk are manifestly within the scope of sanitary regulations."

The only question presented by this appeal is whether it was lawful for the health authorities in the city of New York to require the relator to obtain a permit under section 66 of the Sanitary Code in order to receive, hold, offer for sale and deliver milk, and failing so to do to arrest and punish him.

In great cities, where, in certain sections, life exists under crowded conditions that cannot be fully comprehended unless seen, and where many articles for table consumption by all classes of the community are liable to pass through processes and conditions little short of appalling unless regulated by law, the full and vigorous exercise of the police power in the interest of the public health and general welfare is absolutely essential. It is quite impossible that every offender against the provisions of the Sanitary Code should be accorded due process of law as embracing jury trial and the slow results of the ordinary procedure in the courts.

The vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence and the many other ills that constantly menace great centres of population.

It is true that there may be provisions inserted in a sanitary code that, after giving the police power full effect, are unconstitutional, violative of well-established legal principles and subversive of the rights of the citizen. The courts are always open for the correction of such evils.

In the case before us the requirement of section 66 of the Sanitary Code that the relator should not sell milk without a permit is reasonable and violates neither the Federal nor State constitution, is in accordance with law and long-established precedent.

In the argument of this case several questions have been discussed that are not presented by the appeal. It is, for instance, argued that even conceding a permit to be necessary, the provision that the holder is to be "subject to the conditions thereof," cannot be sustained for a variety of reasons suggested.

It is a complete answer that the form of the permit is not in the record; it does not appear that it has, attached to it, conditions reasonable or otherwise. We consequently express no opinion on the subject.

What we have already said applies with equal force to the argument that the permit might be loaded with conditions, the nature of which is not limited or stated; that it may be used to build up monopoly, to help a favored few as opposed to the many; that there is no other statute which presents such possibilities for blackmail and oppression. These and many other like criticisms are indulged in by appellant.

If the question was before us, the well-settled canon of construction permits of no such argument.

It is presumed that public officials will discharge their duties honestly and in accordance with the rules of law.

The suggestion that the original and amended charter of the city of New York sought to perpetuate statutes not in force is without merit when the entire body of legislation relating to the subject is examined from 1866 to 1901.

It is not necessary to pursue this matter in detail. We hold that the Sanitary Code is in full force and effect.

The order and judgment appealed from should be affirmed.

CULLEN, J. (dissenting):

I think the judgment should be reversed. I do not believe the legislature has empowered the board of health of the city of New York to require permits to enable one to engage in the business of selling milk (Village of Flushing *v.* Carraher, 87 Hun, 63). Doubtless the board of health may prescribe such conditions relating to the character of milk offered for sale as may be necessary to secure public health, but the vending of milk is one of the ordinary vocations of life in which any one has a right to enter on compliance with the health laws and ordinances. It is unnecessary to pursue the discussion of this question, for I think the ordinance, for a violation of which the relator is prosecuted, is void for another reason. The section of the Sanitary Code under review is: "No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit, in writing, from the board of health *and subject to the conditions thereof.*" What those conditions are does not appear in the record nor are they declared anywhere in the Sanitary Code. The learned court below has said that it must be presumed that, in the absence of proof to the contrary, the board has prescribed only reasonable conditions. This presumption does not help the matter. Specific authority to enact a sanitary code was first given to the board of health of the city of New York by section 82 of chapter 335 of the Laws of 1873, which provided that any violation of said code might be punished as a misdemeanor, but this section required that the Sanitary Code should be published in the *City Record*. The power was continued by section 575 of the consolidation act (chap. 410, Laws 1882), which provided that no alteration or amendment of the Sanitary Code should take effect or be binding or in force until the same should have been published once a week for two successive weeks in the *City Record*. This limitation of the power of the board of health is reproduced in section 1172 of the Greater New York charter (chap. 378, Laws of 1897), which prescribes that "no such revision, alteration or amendment will take effect or be binding or in force until the same has been published once a week for two successive weeks in the *City Record*." It will thus be seen that to make an ordinance of the board of health valid, so that its violation may be punished as a crime, it is not only necessary that the regulations prescribed by it should be reasonable, but

that the ordinance should be published. The vice of the section of the Sanitary Code now before us is that it permits the board of health, by indorsing conditions on the permit, to prescribe regulations with reference to the sale of milk without having published the same as required by law. With such an ordinance the relator was not required to comply.

The ordinance has not been validated by subsequent legislation. The section was first enacted in 1896. Section 1172 of the Greater New York charter ratified the Sanitary Code adopted in 1873, which contained no regulation on this subject, only "as amended by law." Section 1172 (chap. 446, Laws of 1901) provided that the Sanitary Code which should be in force on January 1, 1902, should continue to be binding. If the section under discussion was not valid nor in force at the time of the enactment of these two statutes, neither statute assumed to render it legal or give it validity.

PARKER, Ch. J.; GRAY, O'BRIEN, HAIGHT and WERNER, JJ., concur with BARTLETT, J.; CULLEN, J., dissents.

Order and judgment affirmed.

56 At a special term, part II of the supreme court, held in and for the county of New York at the court house in said county on the 7th day of July, 1903.

Present: Hon. Charles H. Truax, justice.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Simon Lieberman, Relator-Appellant, *against* JOHN E. VAN DE CARR, Warden of the City Prison, Defendant-Respondent. } Order on Remittitur.

The above named relator, Simon Lieberman, having appealed to the court of appeals of the State of New York from the order of the appellate division of the supreme court, first department, dated the 20th day of March, 1903, and from the judgment of affirmance entered upon said order in the office of the clerk of the county of New York on the 31st day of March, 1903, which order and judgment affirmed an order of the supreme court of the State of New York entered in the office of the clerk of the county of New York on the 3rd day of December, 1902, and the said appeal having been duly argued at the court of appeals and after due deliberation the court of appeals having ordered and adjudged that the said order and judgment so appealed from as aforesaid be affirmed, and having further ordered and adjudged that the proceedings therein be remitted to the supreme court there to be proceeded upon according to law, now on reading and filng the said remittitur and on moton of George L. Rives, corporation counsel, it is

Ordered that the said order and judgment of the court of appeals

be and the same hereby are made the order and judgment of this court.

Enter. C. H. T., J. S. C.

57 Supreme Court, County of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Simon Lieberman, Relator-Appellant, *against* JOHN E. VAN DE CARR, Warden of the City Prison, Defendant-Respondent. } Judgment on Remittitur.

The above named relator, Simon Lieberman, having appealed to the court of appeals of the State of New York from the order of the appellate division of the supreme court of the State of New York, first department, dated the 20th day of March, 1903 and from the judgment of affirmance entered upon said order in the office of the clerk of the county of New York on the 31st day of March, 1903, which order and judgment affirm the order of the supreme court of the State of New York entered in the office of the clerk of the county of New York on the 3d day of December, 1902, and the said appeal having been duly argued at the court of appeals and after due deliberation the court of appeals having ordered and adjudged that the said order so appealed from as aforesaid be affirmed and an order having been duly entered in the office of the clerk of the county of New York on the 7th day of July, 1903, making the said order and judgment of the court of appeals the order and judgment of this court,

Now, upon motion of George L. Rives, corporation counsel, it is

Adjudged that the said order and judgment so appealed from as aforesaid be and the same hereby are affirmed.

Dated, New York, July 8th, 1903.

THOS. L. HAMILTON, Clerk.

M. J. D.

58 & 59 It is hereby stipulated that the foregoing is a complete copy of the case on appeal upon which the court of appeals rendered its decision, and of the order and judgment of the supreme court, entered upon the remittitur of the court of appeals, and also of the opinion of the court of appeals rendered upon the appeal herein.

Dated New York, June 8th, 1904.

FRANK MOSS,
Attorney for Relator, Appellant.
JOHN J. DELANY,
Corporation Counsel, Attorney for Defendant, Respondent.
WILLIAM TRAVERS JEROME,
H. G. G., District Attorney.

Correct.
J. H. G.

60 To the Honorable Rufus W. Peckham, justice of the Supreme Court of the United States:

And now comes Simon Lieberman, by Stephen J. Cox, his attorney, and complains that in the record and proceedings and also in the rendition of an order and judgment in the proceeding entitled "The People of the State of New York, on the relation of Simon Lieberman, relator-appellant, against John E. Van de Carr, warden of the city prison, defendant-respondent," which is in the supreme court of the State of New York, for the county of New York, on a remittitur of the court of appeals of the State of New York, being the highest court of law and equity of the State of New York, in which a decision could be had, remitting to the said supreme court, for the county of New York, the record in said proceeding, and affirming an order of the appellate division of the supreme court of the State of New York, first department, dated the 20th day of March, 1903, and the judgment entered upon said order in the office of the clerk of the county of New York on the 31st day of March, 1903; which order and judgment affirmed an order of the supreme court of the State of New York, entered in the office of the clerk of the county of New York on the 3rd day of December, 1902, dismissing a writ of *habeas corpus* obtained in behalf of the relator on the 22nd day of October, 1902; which said remittitur of the court directed that an order be entered in said supreme court of the State of New York, affirming said judgment and order; upon which direction an order of
61 affirmance was entered in said supreme court of the State of New York, for the county of New York, on the 8th day of July, 1903, wherein was drawn in question the validity of the provisions of a section of the Sanitary Code of the city of New York, enacted under claimed authority of an act of the legislature of the State of New York, which provided that a violation thereof should be deemed a misdemeanor and punishable as such, and by fine or imprisonment or both,—for a violation of which section the said Simon Lieberman was imprisoned; which section prohibited any person from "receiving, holding, keeping, offering for sale or delivering milk in the city of New York without a permit in writing from the board of health, subject to the conditions thereof," and there was drawn in question the authority and jurisdiction exercised thereunder, upon the ground that such provisions and section are repugnant to the Constitution of the United States; and the decision of said court was in favor of the validity of the said section, all of which appears in the record of said proceedings, and manifest errors have happened to the great damage of the said Simon Lieberman as aforesaid.

Wherefore, the said Simon Lieberman by Stephen J. Cox, his attorney aforesaid, prays for the allowance of a writ of error, and such

other proceedings as may cause the said errors to be corrected by the Supreme Court of the United States.

his
SIMON x LIEBERMAN.
mark.
STEPHEN J. COX,
Att'y for Simon Lieberman,
271 Broadway, Manhattan, New York City.

In presence of
ISIDOR WELS.

Allowed —— —, 1904.

——,
Justice of the Supreme Court of the United States.

62 [Endorsed:] United States Supreme Court. The People of the State of New York, on the relation of Simon Lieberman, plaintiff-in-error, against John E. Van de Carr, warden of the city prison, defendant-in-error. Petition for writ of error. Stephen J. Cox, plaintiff's attorney 271 Broadway, Borough of Manhattan, New York city, N. Y. Received July 29, 1904.

63 In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of Simon Lieberman, Plaintiff-in-Error,
against
JOHN E. VAN DE CARR, Warden of the City Prison, Defendant-in-Error.

And now comes the plaintiff-in-error by his attorney and counsel Stephen J. Cox, and respectfully represents that he feels himself to be aggrieved by the proceedings, order and judgment of the supreme court of the State of New York, for the county of New York, as affirmed by the judgment of the court of appeals of the State of New York, and by said court of appeals remitted to said supreme court; and assigns error as follows, that is to say:

That the basis of the criminal prosecution against said Simon Lieberman, and upon which he was imprisoned is section 66 of the Sanitary Code of the city of New York, which reads as follows:

"No milk shall be received, held, kept, offered for sale or deliv-
"ered in the city of New York without a permit in writing from the
"board of health and subject to the conditions thereof."

Said section was enacted by the board of health of the city of New York under claimed authority of an act of the legislature of the State of New York, which authorized said board to enact and amend a sanitary code, and provided that violation- thereof should be deemed to be misdemeanors, and punishable as such by fine or imprisonment or both.

64 Said section is unconstitutional, null and void under the provisions of article XIV. of the Constitution of the United States, in that it abridges the privileges of said Simon Lieberman, who is a citizen of the United States; and also in that it denies to said Simon Lieberman the equal protection of the laws.

It is attempted by said section to prohibit any person from holding, keeping, offering for sale, or delivering milk without a permit from the health board, thus vesting in that board an arbitrary power to issue or withhold certificates, without restriction, and prohibiting persons from engaging in the milk business without its permits, and without obeying conditions thereof not specified in the Sanitary Code. No practice is provided for the obtaining or issuance of such permits, no reason is necessary in case of denial of an application for a permit, and no legal appeal or review is provided for in case of such denial.

The milk business is the only business dealing in foods, which is thus restricted by said Sanitary Code.

Wherefore, said Simon Lieberman, plaintiff-in-error, prays this honorable court to examine and correct the errors assigned; and for a reversal of the order and judgment of said supreme court of the State of New York.

Dated, New York, March 28, 1904.

his
SIMON x LIEBERMAN.
mark.

In presence of
ISIDOR WELS.

65 [Endorsed:] United States Supreme Court. The People of the State of New York, on the relation of Simon Lieberman, plaintiff-in-error, against John E. Van de Carr, warden of the city prison, defendant-in-error. Assignment of error. Stephen J. Cox, plaintiff's attorney 271 Broadway, borough of Manhattan, New York city, N. Y. Received July 29, 1904.

66 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, for the county of New York, on a remittitur from the court of appeals of said State, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the People of the State of New York, upon the relation of Simon Lieberman, relator, against John E. Van de Carr, warden of the city prison, defendant, wherein was drawn in question the validity of a treaty or statute of, or an

authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-
67 struction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Simon Lieberman, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of June, in the year of our Lord one thousand nine hundred and four (1904).

Issued July 26th, 1904.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court
of the United States.

68 [Endorsed:] New York supreme court. The People of the State of New York *ex rel.* Simon Lieberman, plaintiff-in-error, against John E. Van de Carr, warden of the city prison, defendant-in-error. Writ of error. Received July 29, 1904.

69 UNITED STATES OF AMERICA, *ss:*

To John E. Van de Carr, warden of the city prison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of State of New York, for the county of New York wherein The People of the State of New York upon the

relation of Simon Lieberman are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. W. Peckham, associate justice of the Supreme Court of the United States, this 18th day of June, in the year of our Lord one thousand nine hundred and four.

R. W. PECKHAM,
Associate Justice of the Supreme Court
of the United States.

70 On this 29" day of July, in the year of our Lord one thousand nine hundred and four, personally appeared Samuel Marcus before me, the subscriber, John H. Conway a commissioner of deeds of the city of New York and makes oath that he delivered a true copy of the within citation to William Flynn, warden of the city prison, successor to John E. Van de Carr, on the 29" day of July, 1904.

SAMUEL MARCUS.

Sworn to and subscribed the 29 day of July, A. D. 1904.
JOHN H. CONWAY,
Commissioner of Deeds, the City of New York.

[Endorsed:] Received July 29th 1904.

71 Know all men by these presents, that we, Simon Lieberman, as principal, and Samuel Levy and Charles H. C. Beakes, as sureties, are held and firmly bound unto John E. Van de Carr, warden of the city prison in the full and just sum of two hundred and fifty dollars, to be paid to the said John E. Van de Carr, as warden of the city prison certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of July, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a term of the supreme court of the State of New York, for the county of New York in a proceeding depending in said court, between The People of the State of New York, on the relation of Simon Lieberman against John E. Van de Carr, warden of the city prison a judgment was rendered against the said Simon Lieberman, the relator and the said relator having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid proceeding, and a citation directed to the said John E. Van de Carr, warden of the city prison citing and admonishing him to be and appear at a Supreme Court

of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Simon Lieberman, relator shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

SIMON his x mark. LIEBERMAN. [SEAL.]
SAM LEVY. [SEAL.]
CHARLES H. C. BEAKES. [SEAL.]

Sealed and delivered in presence of—
ISIDOR WELS.

Approved by—
R. W. PECKHAM,
Associate Justice of the Supreme Court
of the United States.

72 STATE OF NEW YORK, }
County of New York, } ss:

On this 16th day of July, 1904, before me personally came Simon Lieberman, Samuel Levy and Charles H. C. Beakes, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

ISIDOR WELS,
Notary Public, New York County.

[Endorsed:] Received July 29th 1904 To be filed with clerk of S. C. of U. S. at Washington D. C. R. W. P.

73 STATE OF NEW YORK, }
County of New York. }

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court of the State of New York, for the said county of New York, by virtue of the annexed writ of error, which was served upon me on the 29th day of July, 1904, and in obedience thereto, do hereby certify that the foregoing pages numbered from one to 58 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the suit of The People on the relation of Simon Lieberman against John E. Van de Carr, mentioned in said writ of error, as the same remain of record and on

file in my office, and the opinion of the court of appeals of the State of New York; and that annexed hereto is the petition for the said writ of error, the assignment of errors, the original writ of error, the citation to the writ in error, with proof of service of said writ of error served upon me, and a copy of the bond.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at my office in the city and county of New York, on the 30th day of July, 1904.

[SEAL NEW YORK.] THOS. L. HAMILTON, Clerk.

Endorsed on cover: File No. 19,431. New York supreme court. Term No. 71. The People of the State of New York *ex rel.* Simon Lieberman, plaintiff in error, *vs.* John E. Van de Carr, warden of the city prison. Filed August 2d, 1904. File No. 19,431.

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* SIMON LIEBERMAN,

Plaintiff-in-Error,

against

JOHN E. VAN DE CARR, Warden, &c.,

Defendant-in-Error.

October Term 1905.
No. 71.

Brief for the Plaintiff-in-Error.

FIRST.

STATEMENT OF THE CASE.

This is an appeal from an order and judgment of the Supreme Court of the State of New York, for the County of New York, affirmed by the order and judgment of the Court of Appeals of said State.

It dismissed a writ of habeas corpus and remanded plaintiff to the custody of the defendant-in-error, who is Warden of the New York City Prison.

The plaintiff-in-error is a milkman, who was held for trial by a magistrate of the City of New York on a charge of violating Section 66 of the Sanitary Code of the Board of Health of New York City. Pending trial he was committed to the custody of the defendant, the Warden of the City Prison, and he sued out the said writ.

There was no dispute as to facts.

Section 66 of the Sanitary Code is as follows:

"No milk shall be received, held, kept, offered for sale or delivered in the City of New York without a permit, in writing, from the Board of Health, and subject to the conditions thereof."

The relator had a permit under said Section 66 of the Sanitary Code. It was revoked by the Board of Health without any reason being assigned for such revocation. The case went up on a naked claim of absolute and arbitrary authority by the Board of Health to arrest all persons who handle milk in any way without a permit, issued under said section, as for a violation of the Sanitary Code. A violation of the Sanitary Code is a misdemeanor under Section 1172 of the New York City Charter, Laws of New York, Chapter 466, of 1897.

The pertinent portion of Section 1172 of Chapter 466 of Laws of 1897 is as follows:

SECTION 1172. The Sanitary Code adopted and declared as such at the meeting of the Board of Health of the Health Department of the City of New York, held in the city as formerly constituted and bounded on the second day of June, eighteen hundred and seventy-three, as amended in accordance with law, is hereby declared to be binding and in force in the city constituted by this act, and shall continue to be so binding and in force, except as the same may, from time to time, be revised, altered, amended or annulled by the Board of Health, as herein provided. And it shall be the duty of said Board, immediately upon organization under this act, to cause to be conformed to this title the Sanitary Code of Ordinances, adopted by the existing Department of Health, and the Departments and Board of Health existing in the several parts of the City of New York before the passage of this act, which shall be called the "Sanitary Code." Said Board of Health is hereby authorized and empowered, from time to time, to add to or to alter, amend or annul any part of the said Sanitary Code, and may therein publish additional provisions for the security of life and health in the City of New York, and distribute appropriate powers and duties to the members and employees of the Department of Health, not inconsistent with the constitution or laws of this State. The Board of Health may

embrace therein all matters and subjects to which, and so far as, the power and authority of said Department of Health extends, not limiting their application to the subject of health only.

The case was so made by the Board of Health to demonstrate its authority.

The plaintiff was in the position of one selling milk without a permit.

After the revocation of the permit, inspectors of the Board of Health found plaintiff's wagon on the street, loaded with milk and in charge of his employee, who admitted that he had been selling milk from it. For this the plaintiff was arrested.

The inspector of the Health Department admitted that the milk "stood well."

Upon the hearing on the writ it was stipulated that the copies of papers and testimony annexed to the traverse of the return are true, and that no other testimony was taken by the magistrate. All the sections of the Sanitary Code concerning permits were put in evidence to show what occupations are restricted, and were summarized by stipulation (pages 22–25).

See the information (pages 12, etc.); the testimony before magistrate (pages 15, etc.); the Milk Sections of the Sanitary Code (pages 22, etc.); the Permit Sections of the Sanitary Code (pages 19–21).

While the traverse was met by a reply, the papers and the testimony before the magistrate, attached to the traverse, were conceded by stipulation to be correct, and were so considered by the Court (page 21).

The question of constitutionality of the ordinance was raised by the plaintiff-in-error and was considered by the Court (pages 33, 18, 27, 30).

SECOND.

Specification of Errors Relied on.

The basis of the criminal prosecution against the plaintiff-in-error and upon which he was imprisoned is said Section 66 of the Sanitary Code of New York City, reading:

"No milk shall be received, held, kept, offered for sale or delivered in the City of New York, without a permit, in writing, from the Board of Health, and subject to the conditions thereof."

Said section was enacted by said Board of Health under claimed authority of an Act of the Legislature of the State of New York above mentioned which authorized said board to enact and amend a Sanitary Code, and provided that violations thereof should be deemed to be misdemeanors and punishable as such by fine or imprisonment, or both.

Said Section 66 in form and terms has the form of law but is unconstitutional, null and void, under the provisions of Amendment XIV of the Constitution of the United States, in that it abridges the privileges of said plaintiff-in-error who is a citizen of the United States, it deprives him of property (the permit to sell milk) wiihout due process of law and in that it denies to him the equal protection of the laws.

It is attempted by said section to prohibit any person from holding, keeping, offering for sale or delivering milk without a permit from the Board of Health, thus vesting in that board an arbitrary power to issue or to withhold permits for doing business, and prohibiting persons from engaging in the milk business without its permits which may contain conditions not specified or indicated in the Sanitary Code.

No practice is provided for the obtaining or issuing of such permits, no statement of reason is necessary in case of denial of an application for a permit, and no legal appeal or review is provided for in case of such denial.

The milk business is the only business dealing in food (or in poisons) which is thus restricted by the Sanitary Code.

THIRD.

Brief of the Argument of Plaintiff-in-Error.

Point I.

Section 66 of the Sanitary Code is unconstitutional, being repugnant to the provisions and the spirit of Amendment XIV of the Federal Constitution.

It is an ordinance enforced by the State (under Section 1172 of the City Charter), which abridges the privileges and immunities of citizens, and deprives persons of property without due process of law, and denies to persons the equal protection of the laws.

The defendant claims that the ordinance is within the police power of the State, being designed to protect the health of the public; but we claim that it is not designed for such purpose, and is not in any view necessary, but is an instrument of oppression, which gives to the unelected Board of Health, arbitrary powers, the misuse of which cannot be corrected by mandamus appeal or other legal proceedings. We claim also that the Board of Health, in its Sanitary Code (the system of law in question), has unnecessarily and unduly selected this business out of many others holding similar relations to the public, and has imposed its prohibition by the permit system on it alone.

Said Section 66 puts the holding, keeping, selling and delivering of milk under the arbitrary and absolute power of the Board of Health, without declaring any lines or limits for the exercise of its prohibitive action, and it allows the Board to load its permits with conditions, the nature of which is not indicated or limited in the ordinance or in the Code.

The intimation in the opinion of the New York Supreme Court that the granting of permits is, under reasonable regulations, designed to secure the health of the community, is not based upon anything in the case or in the Sanitary Code. It is because the ordinance and the Code have no regulations prescribing what qualifications will entitle a man to a permit, or what facts will disqualify him, that we attacked the ordinance.

The Board assumes the right to act under Section 66, to its fullest literal interpretation, without giving or being bound by any reasons. There is nothing which will give to the action of the Board a judicial aspect, subject to review by the courts—nothing that will permit a writ of mandamus to correct unfairness, favoritism or mistake. The will of the Board is absolute. No reason for revoking the permit appears in the case, and the Board of Health has chosen to make its fight on the claim of absolute authority as against a man selling without a permit.

If the Board has the power thus to restrict the handling and selling of milk, it may do the same with any other food or commodity or business that affects the health or safety of the community, directly or remotely.

This great power is self-created, the section being adopted as well as enforced by the same Board.

Though it is a highly penal ordinance, having the force of law through charter provisions, it was not proposed or adopted by the Legislature or the Board of Aldermen, nor by any direct representatives of the electorate, but was adopted by an appointed board, which, in addition to the power of enforcing the laws and ordinances of the State and City, enacts its own restrictive statutes, when it chooses to do so, and selects the classes of foods, articles and occupations to which they shall apply.

The section in question applies not only to vendors of milk by wagons, store or otherwise, but also to cartmen, railroads and all persons who receive or handle it in any way, whether liquid or condensed.

It may easily extend to the keepers of restaurants, hotels and stores and to consumers.

It relates not only to the selling of milk, but also to the receiving, holding, keeping and delivering of it.

It is additional to other sections of the Code which thoroughly protect the community from bad milk (pages 19 to 20 and sections 44, 51, 56, 59, 63, 64, 65, 67, 88); and is additional to a very complete and effective State law (the New York Agricultural Law, Chap. 338, Laws 1893, and Chap. 395, Laws 1895, and amendments).

No other food-vending business is so restricted as is the milk business, and no other is required to operate under such permits (see Permit Digest, pages 22 to 25).

The only matters which approach it in restriction are the selling of live chickens (Sec. 69) and the manufacturing and bottling of mineral waters (Sec. 202).

Among the matters which are not restricted by permit are the selling, handling and storing of meat, though it may be diseased, spoiled or contaminated, and may be improperly handled and kept, and may become rank poison. No permit is required for dead fowls, nor for fish, nor for bread, cake or other cooked foods, though they may be adulterated or pre-

pared in unhealthy places; nor for beer or liquor, nor for canned goods, spices or baking powders, nor for drugs. Even the sale of poisons is not put under permit of the Board of Health.

There is no general permit provision for dealing in perishable foods, but only this independent provision concerning milk.

Point II.

There is no foundation for the claim that the ordinance in question is necessary or advisable for the protection of public health, or that it has any true relation thereto.

The Agricultural Law of the State, and the general provisions of the Sanitary Code, on the subject of bad milk, and of dealing with it, are full and adequate (see copies hereto annexed). These laws forbid the having, handling, selling, etc., of bad milk, and provide adequate penalties. Milk is a necessary food, of universal use, and must necessarily be handled by many tradespeople, by purveyors of food, by carriers and by families; and with no suggestion of proof that existing laws are not sufficient to meet the exigencies of adulteration and deterioration, the whole inoffensive business, whether as to producing, or keeping, or transporting, or selling, or using, is put under an unregulated power of absolute prohibition by a board, in such a way that no act of injustice in so prohibiting can be reviewed by the Court; the only remedy being an appeal to the courts on unjust *imprisonment*—a right so ineffectual thus far that we have been forced to go to the Supreme Court of the United States to vindicate it.

As an illustration of what may be done under the section, we refer to the practice that now prevails in our City, which subjects the small grocer selling a few quarts a day to the section, and passes over the restaurants and kitchen dairies, in which vast quantities of milk are sold for immediate consumption, and may easily be skimmed or adulterated or become deleterious. This and other inequalities are bound to occur, as also favoritisms and corruptions, because of the

form of the ordinance and the impossibility of securing review of the acts done thereunder.

No review is provided for or permitted. No class of persons is named who are entitled to certificates, and none who shall be refused. For instance, it is not provided that good citizens, having good and sanitary places and receiving milk from good and sanitary sources, shall be licensed.

The Commissioner is not required to assign any reason for refusal of a permit.

His decision cannot be reviewed by *certiorari*, first, because no such review is provided for, and second, because he is not required to keep a record; and as no standards are fixed by law for giving or withholding the permit, the Court cannot determine that the Commissioner was in error.

It cannot be reviewed by mandamus, for the Commissioner under the section acts in a judicial capacity, and for the other reasons just stated.

The unreasonableness of the ordinance is plainly seen when, in view of it, we ask:

> "What must a man do to become entitled to engage in receiving, holding, keeping, offering for sale or delivering milk in the City of New York?"

And again:

> "If he applies for permission under the section, and is unjustly refused, what remedy has he?"

The way that the question comes before this Court is through the arrest of a man unjustly deprived of his permit, and the depriving him of his liberty and the destruction of his business.

Point III.

We quote the following statement contained in the opinion of the Appellate Division of the Supreme Court in the case at bar. While upholding said Section 66, nevertheless, it said:

"It was clearly lawful for the Legislature itself to prohibit, or to vest the Board of Health with authority to enact an ordinance prohibiting, any person from dealing in milk without first obtaining a license *under reasonable conditions and restrictions with reference to the source of supply, the manner of transporting and keeping the milk, and such supervision of the same as may tend to insure the delivery of wholesome milk to consumers who are helpless to protect themselves in this regard. Such regulations, however, should be uniform, and the board should not act arbitrarily; and if this section of the Sanitary Code vested in them arbitrary power to license one dealer in a lawful commodity, and refuse a license to another similarly situated, undoubtedly it would be invalid* (Yik Wo *v.* Hopkins, 118 U. S., 356; Gundling *v.* Chicago, 177 U. S., 183; Noel *v.* People, 187 Ill., 587; Dunham *v.* Trustees of Rochester, 5 Cow., 462; Brooklyn *v.* Breslin, 57 N. Y., 551)."

So far, the Court stated and sustained our position; but it proceeded, and said: "Such was not its purpose, nor is that its fair construction." But upon what in the record does the Court base this conclusion? The facts show directly the contrary.

No limitation of the arbitrary power of the Board of Health can be found in the section or in the Sanitary Code (see the permit sections, pages 22 to 28).

To justify the last-quoted statement of the Court in our case we are obliged to depart from the language of Section 66, and to apply the exploded maxim, "The king can do no wrong," to the Board of Health of New York City under all the changing circumstances and conditions of the political life of the City.

The language of Section 66 permits unjust discrimination and favoritism, and the evils of its abuse cannot be corrected by mandamus.

The cases cited by the Court turn on the language of the ordinances in question, and are, in the main, strong authorities for our position.

(1). Yik Wo *v.* Hopkins, 118 U. S., 356.

The Board of Supervisors of San Francisco passed an ordinance making it unlawful for any person to operate a laundry except in stone or brick buildings without its consent. This power was claimed under acts of the California Legislature, granting police powers to the supervisors in terms quite similar to those in the New York Charter. Violation of this ordinance was a misdemeanor. It was used to close up Chinese laundries. A Chinaman, who was arrested, sued out a writ of habeas corpus, which was dismissed by the Supreme Court of California, which held that the laundry business, under some conditions, was dangerous, and that the supervisors had acted under an express grant of power. The United States Supreme Court reversed the action of the California Supreme Court—on the ground, plainly stated, that the power of official consent was arbitrary—and that the action against the Chinese showed the danger of such a permit power. It said:

"They confer, not a discretion to be exercised upon the circumstances of each case, but a naked and arbitrary power to give or withhold a consent, not only as to places, but as to persons." (That is our milk case exactly.). *It said that the ordinance, if upheld, would not be subject to mandamus.* * * * *

"The very idea that one man may be compelled to hold any material right at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery."

(*It is obvious that the laundry business, under the conditions of life in San Francisco, might be as dangerous to health as the milk business of New York, and might as easily justify health legislation*).

(2). People *v.* Noel, 187 Ill., 587:

"A law which invests any body of officials with arbitrary discretion which may be exercised in the interest of a favored few, is invalid because of the opportunity it affords for unjust discrimination."

(3). Gundling *v.* Chicago, 177 U. S., 356:

In that case the ordinance which was sustained gave to the Mayor authority to issue licenses to sell cigarettes *to persons of good character and reputation, suitable to be entrusted with the sale of cigarettes—not, however, to permit the sale of cigarettes containing opium*, &c. The Court sustained this ordinance upon the statement that it does not grant arbitrary power, the Mayor being bound to grant a license to every person fulfilling those conditions—and the Mayor's discretion being of a judicial nature (and therefore subject to review). Referring to the Yik Wo case, the Court said that the ordinance there required no discretion in a legal sense.

In the case at bar there is no provision or condition whatever in ordinance or Code which would give the respondent or any one else a right to review arbitrary action of the Board of Health.

(4.) Dunham *v.* Trustees of Rochester, &c., 5 Cow., 462 (followed and cited in several states).

Quotation from syllabus:

"An act authorizing the trustees of a village corporation to make by-laws relative to hucksters, and to pass such prudential laws for the good government of the village as they may deem necessary, not inconsistent with the laws of the State or the United States, does not authorize them to pass a law that hucksters shall take and pay for a license of the trustees under a penalty, especially where it does not appear that prudence required the by-law. Such a law is in restraint of trade, and as such, contrary to the general principle of the laws of the State. Corporations must show their power to pass by-laws and bring themselves by proof within that power. A by-law in restraint of trade is in general void. By-laws must be reasonable."

(5). St. Paul *v.* Laidler, 2 Minn., 190, following Dunham *v.* Rochester, 5 Cow., 462:

The ordinance provided that all persons might sell

meat in the public market, but must be licensed to sell outside of it.

The defendant was arrested for selling outside without a license.

(P. 206). "The section leaves it in their discretion whether to license or not, and also leaves it in their discretion (The Common Council) whether the person is suitable or not. *Nor, as the ordinance is framed, is there any court or tribunal that can review that discretion. Permission to sell might be granted only to political partisans or personal friends, and there could be no redress for such an exercise of power.*"

(P. 208). Quoting from an English authority. "By common law any person may carry on any trade in any place, unless there be a custom to the contrary; if there be no such custom, a by-law in restraint of trade will be bad." * * *

(P. 209). "On the whole the ordinance is not merely in regulation, but also in restraint of trade, and is unreasonable, unnecessary and inequitable."

"*The burden of proof is on the corporation to show that it has not exceeded its authority.*"

We refer to other interesting cases as follows:

(*a*). City of Richmond *v.* Dudley, 129 Ind., 112.
28 N. E., 312.
28 Am. St. R., 180.
13 L. R. A., 587.

"A city ordinance prohibiting the storage by any person within the city limits of inflammable oils, except upon permission from the Common council, leaving it to the Common Council to say whether a particular place is suitable for the purpose, or a particular person is a proper one to whom to grant permission and allowing the permission to be revoked at the will of the council, is invalid, because of the power of arbitrary discrimination it vests in the council."

(*b*). City of Plymouth *v.* Schultheis, 135 Ind., 389, 701.
35 N. E., 12, 14.

"A city ordinance making it unlawful to carry on the business of a tannery within one mile of the city limits without a permit from the City Council, and which does not define the conditions on which tanneries may be conducted, or on which such permit shall issue, but leaves the propriety of granting such permit to the uncontrolled discretion of the Board of Health and Common Council, is invalid."

(*c*). State *v.* Dubarry, 44 La Ann, 1117.
11 South, 718.
(*d*). State *v.* Deffer, 45 La Ann, 658.
12 South, 841.

"A city ordinance which declares that it shall not be lawful for anyone to establish a private market for the sale of meats, fish, vegetables, etc., without permission of the City Council is illegal and void, since the discretion vested by such an ordinance in the City Council is in no way regulated or controlled, leaving it within the power of the council to grant or refuse the privilege at pleasure."

(*e*). State *v.* Tenant, 110 N. C., 609,
14 S. E., 387.
28 Am. St., 715.
15 L. R. A., 423.

"An ordinance which provides that no person shall erect, add to or generally change any building without first obtaining the permission of the Board of Aldermen, is void in reserving to the Board the arbitrary power to refuse the application of one person and grant that of another."

Point IV.

In our case the relator had a milk business. He yielded to the requirements of the Board of Health and took a permit. The permit was revoked, and he was arrested for sell-

ing without a permit. That caused the destruction of his business—of a class long recognized as salutary and necessary —and not a nuisance.

His business was destroyed by the enforcement of a section which bears on his vocation alone out of many others of a similar character. And yet the New York Courts have held that the Commissioner of the Health Department had the right do this, and that his action was not reviewable!

If it is possible that milkmen may adulterate their milk or sell spoiled or impure milk, the same may be said equally of many other dealers in food who are not interfered with by a Code.

Inequality in the imposition of restrictions is contrary to the constitution, and for the purpose of classifying occupations, to determine the question of equality, all dealers in perishable and corruptible foods should be classed together.

Inequallty appears in a very interesting way on examining Sections 44, 51 and 56 of the Sanitary Code. In those sections, meat, fish, birds, fowl, fruit, vegetables and milk are included in the inspections and restrictions of the Board of Health, and all of them may be condemned and destroyed under Section 56, but only milk is put under restriction by permit. Surely, if there is need to put them all under Section 56, there is also need to put them all under Section 66 if it is to be maintained.

Even poisons are not under permit.

The enforcement of the section may easily result in monopoly or favoritism of the worst character.

The enforcement of the section deprives the defendant, and may deprive others, of the means of livelihood and of property, without due process of law.

The destruction of a man's business, or the annihilation of its value, is a violation of his constitutional rights.

Point V.

Assuming that it is proper for the Board of Health to take to itself the power to investigate and control the business of dealing in corruptible foods, and to adopt the method of per-

mits or licenses, it should not arrogate to itself a personal and arbitrary power; but in its ordinance, or in its code, it should declare the conditions under which men may do business, thus making its powers judicial (as suggested in the Gundling case and others above), and leaving it subject to review when unfairness or favoritism or mistake have caused injustice in the witholding or revoking of a permit.

As said in St Paul *v.* Laidler (*supra*), as well as in the Yik Wo case, there is no court or tribunal that can review the discretion. Permission to sell might be granted only to political partisans or personal friends, and there could be no redress.

We urge this consideration also; that one business should not be selected out of the many of a similar character, for such an unusual action.

Nothing else like it can be found in the Sanitary Code.

Point VI.

The opinion below contains this proposition of law: "The validity of a law or ordinance does not depend upon what had been done by officials acting thereunder arbitrarily or in disregard of their duty, but upon what may be done lawfully thereunder." This dictum is founded upon a statement in Nechamous *v.* Warden, 144 N. Y., at page 539, which was so inartfully expressed as to call out a strong dissenting opinion from three justices.

In the same opinion, at page 535, the same Court said:

> "When the Legislature passes an act which plainly transcends the limits of the police power of the State, it is the duty of the judiciary to pronounce its invalidity and to nullify the legislative attempt to invade the citizens' rights."

And in Rochester *v.* West, 164 N. Y., at page 514 (cited in the opinion below), the Court said:

> "The validity of a statute is not to be determined by what has been done in a particular instance, but by what may be done under it."

After all, we are not objecting to what officials may do in disregard of their duty under the ordinance. They have no

duty to citizens under the ordinance (Section 66), no duty to anybody which a Court may enforce or review. Their only duty is to their own arbitrary judgment, for it is that, without rule, condition or limitation.

If the ordinance is unconstitutional, the relator violated no law when he sold milk without a permit.

Point VII.

An honest milk dealer would not have an adequate remedy in mandamus, for the authority of the Board of Health could not be questioned.

The only justification for the section that the Board can urge is that, notwithstanding the State law and inspectors, milkmen do manage to evade the law, as to adulteration, etc., and to escape punishment in court; therefore, there must be an an arbitrary discretionary control; and the moment we admit an arbitrary discretionary control in any public board, the remedy of mandamus falls out of consideration.

This subject is already adequately covered by the State Agricultural Law (see extracts attached).

The section has no use, added as it is to very drastic enactments, unless it does give to the Board an arbitrary discretion superior to the ordinary practice.

The view of the Board of Health on this consideration is apparent in this case, for, knowing that it would be taken upon an appeal as a test case, it made no effort to show any reason for revoking the permit, but relied solely on its right to do so, without being called upon to give any reason for its action, even to the Supreme Court.

Finally.

The decision should be reversed, and the relator should be discharged.

STEPHEN J. COX,
Atty. for the Relator.

FRANK MOSS,
Of Counsel.

Extracts from Agricultural Law.

LAWS. 1893, CHAP. 338 NEW YORK STATUTES.
" 1895, " 395

SECTION 20. *Definitions.*—The terms, butter and cheese, when used in this article, mean the products of the dairy, usually known by those terms, which are manufactured exclusively from pure, unadulterated milk or cream, or both, with or without salt or rennent, and with or without coloring matter or sage. The terms oleomargarine, butterine, imitation butter or imitation cheese, shall be construed to mean any article or substance in the semblance of butter or cheese not the usual product of the dairy, and not made exclusively of pure and unadulterated milk or cream, or any such article or substance into which any oil, lard or fat not produced from milk or cream enters as a component part, or into which melted butter or butter in any condition or state, or any oil thereof has been introduced to take the place of cream. The term, adulterated milk, when so used, means:

1. Milk containing more than eighty-eight per centum of water or fluids.

2. Milk containing less than twelve per centum of milk solids.

3. Milk containing less than three per centum of fats.

4. Milk drawn from cows within fifteen days before and five days after parturition.

5. Milk drawn from animals fed on distillery waste or any substance in a state of fermentation or putrefaction or on any unhealthy food.

6. Milk drawn from cows kept in a crowded or unhealthy condition.

7. Milk from which any part of the cream has been removed.

8. Milk which has been diluted with water or any other fluid, or to which has been added or into which has been introduced any foreign substance whatever.

All adulterated milk shall be deemed unclean, unhealthy, impure and unwholesome. The term, pure milk and un-

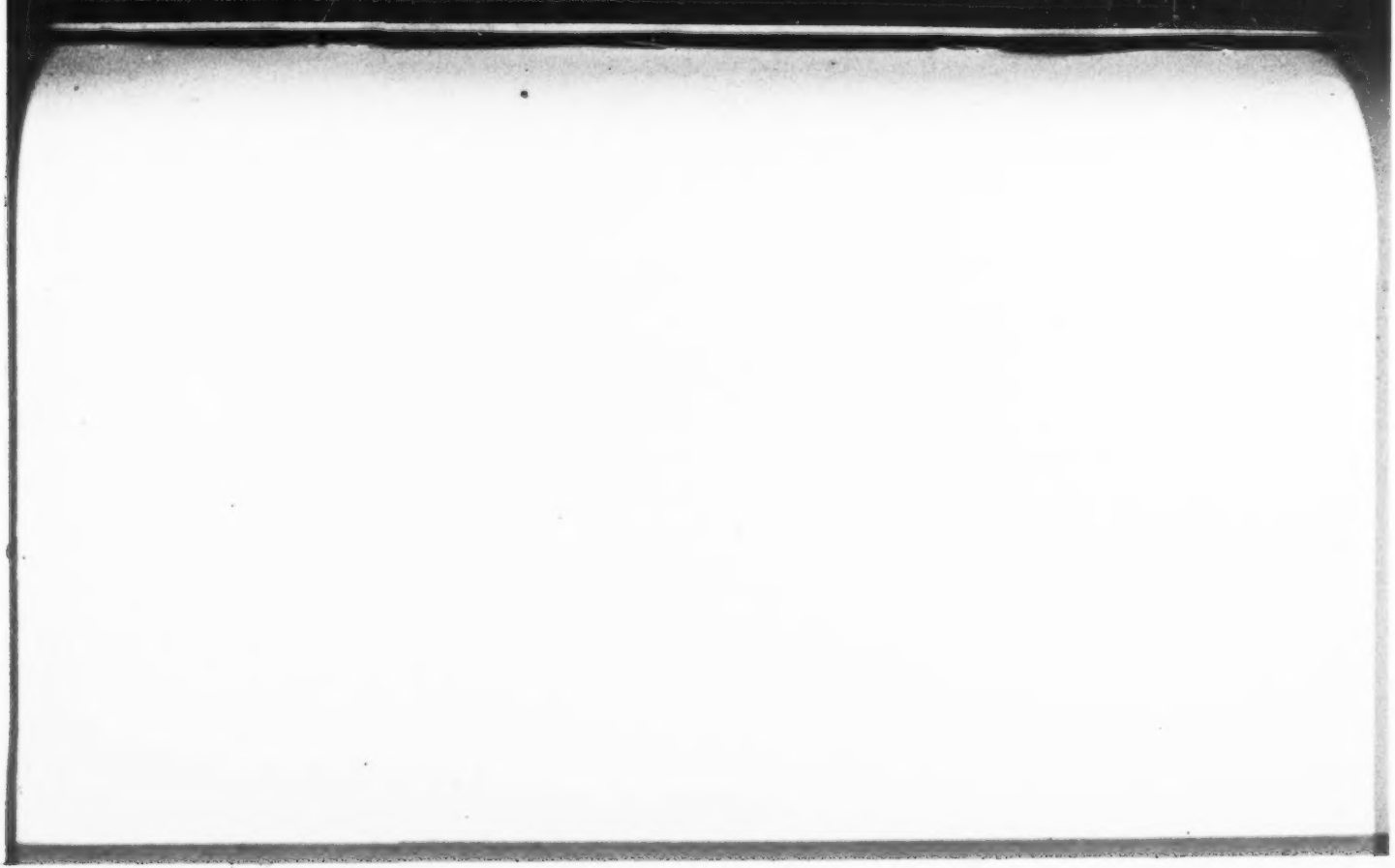
adulterated milk, when used singly or together, mean sweet milk not adulterated, and the terms pure cream or unadulterated cream, when used singly or together mean cream taken from pure and unadulterated milk.

SECTION 22. *Prohibition of the Sale of Adulterated Milk.*—No person shall sell or exchange, or offer or expose for sale or exchange, any unclean, impure, unhealthy, adulterated or unwholesome milk, or any cream from the same, or sell or exchange, or offer or expose for sale or exchange, any article of food made from such milk, or of or from cream from the same, or manufacture from any such milk or cream from the same, or any article of food.

SECTION 23. *Regulations in Regard to Butter and Cheese Factories.*—No person shall sell, supply or bring to be manufactured to any butter or cheese factory any milk diluted with water or any unclean, impure, unhealthy, adulterated or unwholesome milk, or milk from which any of the milk has been taken, except pure skim milk to skim cheese factories. No person shall sell, supply or bring to be manufactured to any butter or cheese factory any milk from which there has been kept back any part of the milk commonly known as strippings, or any milk that is sour, except pure skim milk, to skim cheese factories. The owner or the proprietor or the persons having charge of any butter or cheese factory, not buying all the milk used by him, shall not use for his own benefit, or allow any of his employees or any other person to use for his own benefit, any milk, cream, butter or cheese, or other product thereof, brought to such factory, without the consent of the owners of such milk or the products thereof. Every butter or cheese manufacturer not buying all the milk he uses shall keep a correct account of all the milk daily received, of the number of packages of butter and cheese made each day, and the number of packages and aggregate weight of cheese and butter disposed of each day; which account shall be open to inspection to any person who delivers milk to such factory.

SECTION 103. *Violations of Agricultural Law.*—Any person who disregards, disobeys or violates any proclamations, notice, order or regulation, lawfully issued or prescribed by

the Commissioner of Agriculture for the suppression or prevention of the spread of infectious or contagious diseases among domestic animals, or who violates any of the provisions of Sections Eighty and Eighty-two of Article Five of the Agricultural Law, is guilty of a misdemeanor; every person who violates any of the provisions of Article Two of said chapter is guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment of not less than one month, nor more than six months, or by both such fine and imprisonment, for the first offense, and by six months' imprisonment for the second offense; and any person who violates any of the provisions of Article Three of said chapter is guilty of a misdemeanor, and shall be punished by a fine of not less than fifty dollars, nor more than one hundred dollars.



Supreme Court of the United States.

THE PEOPLE OF THE STATE OF New York, *ex rel.* Simon Lieberman,

Plaintiff-in-error,

against

JOHN VAN DE CARR, Warden, &c.,

Defendant-in-error.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF-IN-ERROR.

As to the Brief for Defendant-in-error.

I.

It is suggested in the brief of defendant-in error, at page 5, that it does not appear that a Federal question was raised, except by the opinion of Judge Bartlett in the Court of Appeals. The Federal question was in the case from the beginning—and that this is so, is clear from the specific statement of Justice Bartlett at page 33 of the Record. He said: "It is claimed also that it infringes Section 1 of the fourteenth amendment of the Federal Constitution, providing," etc.

This statement by Justice Bartlett is enough to give us place in the Supreme Court of the United States, for it shows conclusively that the question was raised and was decided adversely to the plain-

tiff-in-error, and that the judgment of the Court included necessarily a determination that the Federal Constitution was not violated.

See Foster's Federal Practice, 2d Ed., Vol. 2, pages 1003–4 and cases therein cited.

"The opinion of the State Court may be examined to see what questions were decided."

20 Wall, 590; 108 U. S., 477; 112 U. S., 129; 119 U. S., 116; 139 U. S., 295; 142 U. S., 254; 158 U. S , 180.

The opinion of the Court is part of the Record, by rule.

II.

We stated to the Court that there is no provision anywhere in the Sanitary Code, or elsewhere, prescribing what requirements shall be complied with to entitle an applicant to a permit, and no provision limiting in any way the arbitrary and unreviewable power assumed in Section 66, or making it subject to judicial review; and that all the laws and ordinances touching the subject are shown verbatim in the record. We were not surprised that the Court should be loath to accept the statement, and should seek by questions to discover whether we had not overlooked something or made some mistake in our statement. To a judicial mind there would seem to be an absolute necessity for such provisions. The courts below erred, because they did not examine the record with sufficient care to appreciate the fact, that Section 66 is absolute and free from any limitation on the power therein expressed. We stated

that the defendant-in-error never had claimed to act on anything but the arbitrary power assumed in Section 66.

An examination of the brief of defendant-in-error corroborates us. *No statement or claim is made that there is any ordinance or law relieving the absolute and arbitrary power of the Board of Health assumed by it in Section 66.* There is none.

III.

At page 17 of the defendant's brief, is a discussion of licenses to permit the practice of medicine. This subject was involved in a question put to counsel by one of the Justices. We desire to make this comment on the subject:

1. It is conceded as suggested by one of the Justices that the power to license occupations for the purpose of raising revenue may be exercised. That is essentially the power of taxation. It does not involve arbitrary discrimination, and an applicant for license tendering the fee would have a judicial remedy for arbitrary exclusion. (There is no license fee attached to the permit in this case. It is not a revenue ordinance.)

2. The statutes concerning admission to practice the professions are so drawn that one unfairly barred has his remedy by appeal to the courts. WE must realize how intolerable it would be for us to be subject to arbitrary and uncontrolled and unreviewable power of any board of officials as to our right to enter upon the practice of our profession. There is no such system.

3. The courts have always been specially careful concerning laws and ordinances restraining

trade, and have many times declared legislation of that character invalid. They have been quicker to act in that field than in any other. This is elementary. It was well stated in the oft-cited case of Dunham v. Trustees, &c., 5 Cow., 469: "A by-law in restraint of trade is in general void; by-laws must be reasonable."

4. We are not attacking the permit or license system in general. When the rights of citizens are conserved it may be a very salutary method of exercising police power. What we do object to is the unusual assumption of arbitrary, absolute and exclusive power in this particular ordinance—which is open to all the criticisms expressed in the important authorities abstracted in our main brief.

IV.

The long discussion in defendant's brief of the validity of the law under which the Sanitary Code was enacted, and of the right of the States to pass police regulations, and of the presumption of constitutionality, and of the power of the State to delegate police power to local boards, and of the necessity and legal propriety of effective "milk legislation" and of similar legislation, *does not touch the question at issue.* We are not complaining of the milk laws in general, which, however drastic, give the milk dealer his day in court,—we complain of one, isolated, section of the Sanitary Code, which presents a different question from any that has been decided in the authorities cited by the defendant-in-error.

If Section 66 or its accompanying sections stated what requirements an applicant for a permit must

meet in order to obtain it, no matter how difficult of compliance (within reason), we then could not complain, because the assumption of power would not be arbitrary and absolute, but would be subject to judicial review, and the milk dealer would have his day in court before his business could be destroyed, and before becoming subject to a power of arrest; and all the milk dealers would be under the same rules and requirements.

V.

Several other questions were raised by queries from the bench, and counsel asks the Court to note these statements:

(1). On the question whether the sections of the Sanitary Code, printed at pages 19 and 20 of the Record, do not provide the essentials upon an application for a permit, so that an applicant who has complied with them may enforce, by legal proceeding, his right to have a permit:

A. The defendant-in-error makes no such contention. His position is that there is exactly the arbitrary power shown in Section 66 by its plain terms.

B. By reading Sections 63 to 67, it will be seen that each section stands by itself, is complete in itself, and does not depend on any other section. In fact they were adopted at different times. Each one of these sections furnishes the basis for an independent prosecution as for a misdemeanor. A compliance with every one of the other sections might leave something undone upon which the Board of Health could assume to act, as, for

instance, the kind of a room in which the milk is kept or sold (and each permit may have conditions attached to it differing from the conditions attached to other permits).

C. The terms of the other sections could have no application to a request for a permit by one who was not previously a milk dealer, for he would not have dealt in milk and could not say that his milk was good, or that he had complied with the law. This illustration shows that there is no intent in the legislation to limit Section 66 by the provisions of the other sections.

(*D*). It would be no hardship to require the Board of Health to make a clear and fair statement in its ordinance of the requirements and conditions of permits. It ought to be able to endure judicial investigation of a complaint of favoritism or oppression. No harm would be done to public interests, and the oppression and favoritism that seem to be bound to creep into our City departments at times, would be prevented.

(**2**). (*A*). On the question whether the Record shows that there is no other statement of requirements, etc., than appears in Section 66:

There appears in the Record, page 21, this statement: "There was offered and received in evidence the section of the Sanitary Code referred to in the stipulation, a summary of which now appears, the summary being consented to as embodying all of the requirements for permits." The stipulation precedes the statement. All the sections referred to are at pages 19 to 25

These being all of the ordinances, there is found to be no limitation on Section 66; and the position of the defendant-in-error, in the case, and in his present brief, is not that plaintiff-in error has any standing in court upon an unfair refusal of permit but that the section, arbitrary and absolute as it is, is a proper exercise of the police power.

(*B*). In stating that ordinances of the Board of Health are obscurely published we did not mean that some provisions qualifying Section 66 had been published; but that in general board-made penal ordinances are adopted loosely and published obscurely in the *City Record*, not a general newspaper, and that the assumption by unelected boards of penal powers, under general authority conferred by the Legislature, should be more carefully watched and limited than it is. We doubt whether any legislature could enact such a statute as this Section 66.

(**3**). On the question by one of the Justices as to whether the "Yick Wo case" did not depend on the general acts of oppression committed under the ordinance, we suggest that a reading of the opinion shows that the fault found was with the ordinance,—the oppressive acts being illustrations of its evil character. In our case we have a milk business destroyed, though the milk "stood well"—and we would not have been permitted to show on the trial that other milk industries had been closed up without proper reason. The issues of the case restricted us to our own matter. The evil of the law is in its natural possibilities. The injury to this one man brings the matter before the Court.

VI.

The reversal of the decisions of the State Court would result simply in compelling the Board of Health to amend Section 66 so that the rights of honest milk dealers would be legally protected against arbitrary and unreviewable exclusion from business by the Board of Health under penalty of imprisonment. A statement of the reasonable requirements for the obtaining and holding of a permit is all that is needed.

Respectfully submitted.

FRANK MOSS,
Of Counsel for Plaintiff-in-error.

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OCT 16 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1905.

THE PEOPLE OF THE STATE OF NEW YORK,
EX REL. SIMON LIEBERMAN,
Plaintiff-in-Error,
against
JOHN E. VAN DE CARR, Warden of the City Prison,

No. 71.

BRIEF FOR DEFENDANT-IN-ERROR.

THEODORE CONNOLY,
Of Counsel for Defendant-in-Error.

19,431.

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Supreme Court of the United States.

OCTOBER TERM, 1905.

The People of the State of New York *ex rel.* Simon Lieberman, Plaintiff in Error, *against* John E. Van De Carr, Warden of the City Prison, Defendant in Error.	No. 71.

Statement of Facts.

This case originated in the prosecution of the plaintiff in error before a City Magistrate in The City of New York for a violation of section 96 of the Sanitary Code of the Board of Health of the Department of Health of The City of New York, which by section 1172 of the Greater New York Charter (Laws of New York of 1901, chap. 466) is made a misdemeanor.

Plaintiff in error was held by the City Magistrate in $100 bail to answer the charge, but was surrendered by his bondsman and remanded to the custody of the defendant in error, the Warden of the City Prison of The City of New York.

The sections of the Greater New York Charter, New York Laws of 1901, chapter 466, which are relevant are as follows:

The Board of Health which is the head of the Department of Health and the Department of Health itself are constituted by chapter 19, title I. of the Greater New York Charter, just referred to.

The Sanitary Code, which contains the section under which the permit for the sale, etc., of milk is required in New York City is section 1172, which, so far as relevant is as follows:

"Section 1172. The sanitary code which shall "be in force in the city of New York, the first day "of January, nineteen hundred and two, and all "existing provisions of law for fixing penalties for "violations of said code are hereby declared to be "binding and in force in the city of New York, and "shall continue to be so binding and in force, ex- "cept as the same may from time to time, be revised, "altered, amended or annulled as herein provided. "* * * Said board of health is hereby author- "ized and empowered, from time to time to add to "and to alter, amend or annul any part of the said "sanitary code, and may therein publish additional "provisions for the security of life and health in the "city of New York, and confer additional powers "on the department of health, not inconsistent with "the constitution or laws of this state and may pro- "vide for the enforcement of the said sanitary code "by such fines, penalties, forfeitures, or imprison- "ment as may by ordinance be prescribed. The "board of health may embrace in said sanitary code "all matters and subjects to which, and so far as "the power and authority of said department of "health extends, not limiting their application to "the subject of health only. Any violation of said "sanitary code shall be treated and punished as a "misdemeanor * * *".

It is also provided by section 1222 of the same statute:

> "Any violation of the sanitary code shall be "treated and punished as a misdemeanor, and the "offender shall also be liable to pay a penalty of "fifty dollars to be recovered in a civil action in the "name of the department of health of the city of "New York."

It is unnecessary to cite the other sections of this chapter, as the organization and power of the Board of Health, the head of the Health Department and the Department itself are not attacked, the only complaint being that section 66 of the Sanitary Code is unconstitutional.

This section here complained of is as follows:

> "Section 66. No milk shall be received, held, "kept, either for sale or delivered in the city of "New York without a permit in writing from the "board of health, and subject to the conditions "thereof."

Record, page 12, fol. 18.

A writ of habeas corpus having been obtained upon the coming on of this matter before Mr. Justice Steckler, of the Supreme Court at Special Term, the writ was dismissed and the prisoner remanded to the custody of the defendant in error (see Opinion, page 277, Record).

The testimony before the City Magistrate upon the examination showed that one Mike Schmidt, a driver of a wagon belonging to plaintiff in error, sold milk, although the permit of plaintiff in error had been revoked by the Board of Health and his application for a permit been denied.

After the dismissal of the writ at Special Term of the Supreme Court an appeal was taken by plaintiff in error to the Appellate Division of the Supreme Court in the First Department, where the order of the Special Term

was unanimously affirmed and an opinion written by Mr. Justice Laughlin, concurred in by all the Justices, which appears at page 29 of the Record.

Thereafter an appeal was taken by plaintiff in error to the Court of Appeals of the State of New York where the decision of the Appellate Division was affirmed, the opinion being written by Mr. Justice Bartlett (Record, page 2[illegible]

Seven Judges voted for affirmance and one, Justice Cullen, dissented, but not upon the constitutional question involved.

Thereafter plaintiff in error obtained a writ of error and under this writ this hearing is now had.

The assignment of error is as follows:

> "Said section" (referring to sec. 66 of the Sani-
> "tary Code) " is unconstitutional, null and void
> "under the provisions of Article XIV. of the Con-
> "stitution of the United States, in that it abridges
> "the privileges of said Simon Lieberman, who is a
> "citizen of the United States, and also that it denies
> "to said Simon Lieberman the equal protection of
> "the laws.
>
> "It is attempted by said section to prohibit any
> "person from holding, keeping, offering for sale, or
> "delivering milk without a permit from the Health
> "Board, thus vesting in that Board an arbitrary
> "power to issue or withhold certificates, without re-
> "striction, and prohibiting persons from engaging
> "in the milk business without its permits, and with-
> "out obeying conditions thereof not specified in the
> "Sanitary Code. No practice is provided for the
> "obtaining or issuance of such permits, no reason is
> "necessary in case of denial of an application for a
> "permit, and no legal appeal or review is provided
> "for in case of such denial.

"The milk business is the only business dealing in "foods which is thus restricted by the Sanitary "Code."

Record, page 41.

It is to be noted that *the Record does not show that any Federal question was raised, except that, in the opinion of Judge Bartlett, in the Court of Appeals (page 33 of Record), for the first and only time (there being no certificate of a State Judge) appears a reference to the Fourteenth Amendment of the United States Constitution.*

In support of the decision of the State court in this matter, respondent in error respectfully submits the following

POINTS.

I.

The only question to be determined is whether section 66 of the Sanitary Code is in conflict with the Fourteenth Amendment of the United States Constitution.

The law under which the section of the Sanitary Code in question was passed and the section itself have been held by the highest court of the State to be valid and, therefore, is valid under the State law.

People *ex rel.* Metropolitan Street Ry. Co. *vs.* New York, 199 U. S., 1.

The dissent of Judge Cullen in the Court of Appeals in the present case is upon a question that has no relation to the constitutional question.

The only question before this court is the constitutionality of the ordinance or regulation complained of under

the Fourteenth Amendment of the United States Constitution.

Barbier *vs.* Connolly, 113 U. S., 27.
In re Kemmler, 136 U. S., 436, 447.
Crowley *vs.* Christensen, 137 U. S., 86.
Ashley *vs.* Ryan, 153 U. S., 440.
Davis *vs.* Massachusetts, 167 U. S., 43, 48.
Wilson *vs.* Eureka City, 173 U. S., 32.
Gundling *vs.* Chicago, 177 U. S., 185.
Lombard *vs.* West Chicago Park Com., 181 U. S., 333, 343.
Fisher *vs.* St. Louis, 194 U. S., 351.

II.

Section 66 of the Sanitary Code of The City of New York does not violate the Fourteenth Amendment of the United States Constitution.

It is well settled law in this Court that the Fourteenth Amendment does not take away from the State the power to pass police regulations affecting the health, safety and morals of the people.

Barbier *vs.* Connolly, 113 U. S., 27, 31.
Minneapolis & St. Louis Railway Co. *vs.* Beckwith, 129 U. S., 26-29.
Giozza *vs.* Tiernan, 148 U. S., 657.
Jones *vs.* Brim, 165 U. S., 180-182.

In the last case cited the Court said, referring to the Fourteenth Amendment:

> "But it does not limit, nor was it designed to "limit the subjects upon which the police power of "a State may be lawfully exerted" (165 U. S., 182).

The presumption which exists in favor of the constitutionality of a statute is especially strong in the case of statutes intended for the protection of the health and comfort of the community, and it will be presumed that each State Legislature has most knowledge of the needs of its people.

Powell *vs.* Pennsylvania, 127 U. S., 678-684.
Atkin *vs.* Kansas, 191 U. S., 207-223.

There is no need of argument to prove that one of the fundamental duties of the State is to exercise the police power to protect and preserve the health of its people.

Commonwealth *vs.* Alger, 7 Cush., 53.
Beer Co. *vs.* Massachusetts, 97 U. S., 25.
Hawkes *vs.* New York, 170 U. S., 189.

In Beer Co. *vs.* Massachusetts, 97 U. S., 25, the Court said at page 33:

> "Whatever differences of opinion may exist as
> "to the extent and boundaries of the police power,
> "and however difficult it may be to render a satis-
> "factory definition of it, there seems to be no
> "doubt that it does extend to the protection of the
> "lives, health and property of the citizens and to
> "the preservation of good order and public morals.
> "The Legislature cannot by any contract divest
> "itself of the power to provide for these objects.
> "They belong emphatically to that class of objects
> "which the application of the maxim, *salus populi*
> "*suprema lex;* and they are to be attained and
> "provided for by such appropriate means as the leg-
> "islative discretion may devise. That discretion
> "can no more be bargained away than the power
> "itself."

One of the latest judicial utterances of this Court on the necessity of police legislation is in the case of Jacob-

son *vs.* Massachusetts, 197 U. S., 11, where a State law requiring compulsory vaccination was held valid. The Court said:

"According to settled principles the police power "of a State must be held to embrace, at least such "reasonable regulations established directly by legis- "lative enactment as will protect the public health "and the public safety (Gibbons *vs.* Ogden, 9 "Wheat, 1, 203; Railroad Company *vs.* Husen, 95 "U. S., 465, 470; Beer Company *vs.* Massachusetts, "97 U. S., 25; New Orleans Gas Co. *vs.* Louisiana "Light Co., 115 U. S., 650, 661; Lawton *vs.* Steele, "152 U. S., 133).

"*It is equally true that the State may invest local "bodies called into existence for purposes of local "administration with authority in some appropriate "way to safeguard the public health and the public "safety. The mode or manner in which these re- "sults are to be accomplished is within the discretion "of the State, subject, of course, so far as Federal "power is concerned only to the condition that no "rule prescribed by a State, nor any regulation "adopted by a local governmental agency acting un- "der the sanction of State legislation shall contra- "vene the Constitution of the United States or in- "fringe any right granted or secured by that instru- "ment*" (197 U. S., 24).

Bearing these considerations in mind, let us now examine the section of the Sanitary Code in question in connection with the provisions of the Fourteenth Amendment.

Section 66 of the Sanitary Code of the Health Department of The City of New York reads as follows:

"Sec. 66. No milk shall be received, held, kept, "offered for sale or delivered in the city of New "York without a permit, in writing, from the board "of health and subject to the conditions thereof."

It may be remarked in passing that the section is evidently directed against those who deal in milk and not against those who have bought milk for their own consumption, and that the receiving, holding, keeping, offering for sale and delivering of milk have relation to milk dealers and not to other members of the community.

The present plaintiff in error is a dealer in milk, and it was for his offense as such dealer that he was arrested. What might be the decision of the Court if the section was attempted to be twisted into a weapon against the private citizen keeping milk for his own use, need not be here considered.

It is absolutely settled by authority in almost every State of the Union that health statues which may be passed either by a State Legislature or ordinances passed under legislative authority by the municipal departments of cities which regulate the conditions under which the supply of milk to the community may be had, are valid police statutes and within the power of the Legislature, or of their agents, the municipal corporations acting under statutory authority.

The following list of cases, which might be extended indefinitely, shows under what varying circumstances the rule has been applied: Fisher *vs.* St. Louis, 194 U. S., 361; Johnson *vs.* Simonton, 43 Cal., 242, 249; State *vs.* Schlenker, 112 Iowa, 642; Kansas *vs.* Cook, 38 Mo. App., 660; Sanders *vs.* Commonwealth, 25 Ky. Law Rep., 1165; State *vs.* Fourcade, 45 La. Ann., 717; State *vs.* Dupaquier, 46 La. Ann., 577; State *vs.* Stone, 46 La. Ann., 147; State *vs.* Rogers, 95 Maine, 94; Deems *vs.* Baltimore, 80 Md., 164, 26 L. R. A., 541; State *vs.* Broadbelt, 89 Md., 565; Commonwealth *vs.* Farren, 9 Allen, 489; Commonwealth *vs.* Nichols, 10 Allen, 199; Commonwealth *vs.* Waite, 11 Allen, 264; Commonwealth *vs.* Evans, 132 Mass., 11; Commonwealth *vs.* Luscomb,

130 Mass., 42; State *vs.* Nelson (Minnesota), 66 Minn., 166, 68 Md., 1066, 61 Am. Sup. Rep., 399, 34 L. R. A., 318; State *vs.* Crescent Creamery Co., 83 Minn., 284; Littlefield *vs.* State, 42 Neb., 223; State *vs.* Campbell, 64 N. H., 402; Shivers *vs.* Newton, 45 N. J. L., 469; Polinsky *vs.* People, 73 N. Y., 65; People *vs.* Cipperly, 37 Hun, 324, 101 N. Y., 634; People *vs.* West, 106 N. Y., 293; People *vs.* Kibler, 106 N. Y., 321; People *vs.* Briggs, 114 N. Y., 56; People *vs.* Biesecker, 169 N. Y., 53; People *vs.* Bowen, 182 N. Y., 10; State *vs.* Smith, 10 R. I., 258; State *vs.* Smyth, 14 R. I., 100; State *vs.* Groves, 15 R. I., 208; City of Norfolk *vs.* Flynn, 101 Va., 473.

In the case of Sanders *vs.* Commonwealth, 25 Ky. Law Rep., 1165, where it was held that a statute prohibiting the sale of milk from cows fed on "still slop" was constitutional, the Court said:

> "The development in the science of bacteriology "in recent years has conclusively proven that the "microbe is a most potent agent in the propagation "of contagious diseases, and that there is no more "favorable element for their absorption, growth and "development than milk, and that milk contamin- "ated by their presence communicates diphtheria, "typhoid fever, tuberculosis and other kindred con- "tagious diseases to human beings, especially to the "young. * * * Nearly every police regulation "affects to some extent property rights, and whilst "this power cannot be made the excuse for oppres- "sive and unjust legislation, the courts are not per- "mitted to say that the Legislature may not enact "laws apparently necessary for the public health."

In the case of the State *vs.* Schlenker, 112 Iowa, 642, the Court said:

> "Statutes enacted to secure the sale of pure food, "and to prevent adulteration are quite common in "this country, and have ever been referred to the

"police power. See English sale of food and drugs, "Act of 1875 (chap. 63); Tenn. Laws, 1859, 1860, "chap. 81, sec. 4; Mass. Rev. St., chap. 131, sec. "1. They are enacted to prevent fraud and to con- "serve the public health, and as such are a valid "exercise of the police power."

In the case of Deems *vs.* Baltimore, 80 Md., 164, the Court said with respect to the power of inspection and regulation of milk:

"The sale of milk as an article of food enters "largely into the daily consumption of every house- "hold, and there is no more fruitful source of dis- "ease than the use of adulterated and unwholesome "milk. And if the appellant's contention be right, "that if the question of whether or not milk which is "daily offered for sale in every part of a large and "populous city comes up to the standard prescribed "by the ordinance must be determined by the ordin- "ary process of judicial investigation or by chemical "analysis, it would be impossible to prevent the "danger to the public health necessarily resulting "from impure and unwholesome milk. And "it is absolutely necessary therefore that the "appellee should have the power to provide for its "inspection by proper means and instruments, and "if upon such inspection it shall be found not to "come up to the standard prescribed by the ordi- "nance to direct that the offending thing shall be "destroyed."

Speaking of the danger which comes from an infected milk supply, the Court in the case of the State *vs.* Broadbelt, 89 Md., 565, said:

"The strides which our knowledge of bacteri- "ology has made in recent years are generally "known, and the ubiquitous microbe has been "shown to be a potent agent in the propagation of "disease. Tuberculosis, identical, it is said, with

"consumption in man, is caused by the organism "known as 'Koch's bacillus,' and is readily com- "municable through milk. Diphtheria is another "contagious disease whose specific organism finds "in milk favorable conditions of growth, and there "is abundant evidence to show that contaminated "milk transmits this contagion. Cholera has again "and again been traced to the same source, and "scarlet fever is generally believed to be communi- "cable by infected milk, and it is said that it may "be even caused by an eruption on the udder. "Typhoid fever bacilli have been detected in milk "supposed to be wholesome. Besides conveying "disease, milk occasionally contains certain germs "which form poisonous products known as "'ptomanes.' Milk may carry the bacilli of these "and perhaps other deadly diseases to infancy, to "adolesence and to age; to the delicate and to the "robust alike, and to persons in every class and "condition of society.

"It may receive these germs direct from the cow, "if the cow be unhealthy, or it may absorb them "from the dairy, the dairy utensils, or the stables, "if these be uncleanly. Thorough inspection of cat- "tle and dairies may reduce the frequency of infec- "tion. The preservation of the public health by "preventing the sale of infected milk, or of milk "that may come from infected sources, when milk, "by reason of its almost universal use, in one form "or another, as an article of food, is especially likely "to spread disease, is one of the most imperative "duties of the State, and obviously one most in- "contestably within the scope of the police power."

We wish to direct the attention of the Court to the frequency with which the court of last resort in the State of New York has sustained the statutes of the State, or the helath regulations of its cities, towns and villages respecting the sale of pure milk.

The latest opinion of the Court of Appeals of New York State upholding the constitutionality of the Agricultural Law (Laws 1893, ch. 338; Laws 1900, ch. 101), creating a standard of pure milk in that State, is found in the case of People *vs.* Bowen, 182 N. Y., 10.

In that case, after holding that the Legislature has a right to prescribe a standard of milk, the Court said, at page 10:

> "The principles upon which such legislation is "held to be constitutional have been so thoroughly "discussed that we do not deem it necessary to do "anything more at this time than to cite the author- "ities which uphold it as a proper exercise of the "police power in order to prevent fraud and pre- "serve health."

In an unbroken line of decisions the New York Court of Appeals has sustained the validity of the milk laws.

Similar legislation regulating the sale and standard of oleomargarine has also received uniform support from the courts. Powell *vs.* Pennsylvania, 127 U. S., 678; Plumley *vs.* Massachusetts, 155 U. S., 461; Schollenberger *vs.* Pennsylvania, 171 U. S., 1; Capital City Dairy Co. *vs.* Ohio, 183 U. S., 238; *In re* Brosnahan, 18 Fed. Rep., 62; Armour Packing Co. *vs.* Snyder, 84 Fed. Rep., 136; Cook *vs.* State, 110 Ala., 40; State *vs.* Armour Packing Co., 100 N. W., 59 (Iowa); State *vs.* Rogers, 95 Me., 94; McAllister *vs.* State, 72 Md., 390; Pierce *vs.* State, 63 Md., 592; Fox *vs.* State, 89 Md., 381; Wright *vs.* State, 88 Md., 436; Commonwealth *vs.* Huntley, 156 Mass., 236; People *vs.* Rotter, 91 N. W. Rep., 167 (Michigan); Butler *vs.* Chambers, 36 Minn., 69; State *vs.* Horgan, 55 Minn., 183; Wiedman *vs.* State, 56 N. W. Rep., 688; State *vs.* Addington, 77 Mo., 110; State *vs.* Bockstruck, 136 Mo., 335; Beha *vs.* State, 93 N. W., 155 (Neb.); State *vs.* Marshall, 64 N. H., 549; State *vs.* Collins, 45 Atl., 1080 (N. H.), 171 N. S., 30; State *vs.* Ball, 70 N. H., 40; State *vs.* Newton, 50

N. J. L., 534; People *vs.* Arensberg, 105 N. Y., 123; Palmer *vs.* State, 39 Ohio St., 236; State *vs.* Ransick, 62 Ohio St., 283; Commonwealth *vs.* Weiss, 139 Pa. St., 247; Commonwealth *vs.* Van Dyke, 13 Pa. Sup. Ct., 484; Commonwealth *vs.* McCann, 14 Pa. S. Ct., 221; Commonwealth *vs.* Diefenbacher, 14 Pa. Sup. Ct., 264; State *vs.* Meyer, 42 W. Va., 822.

In a like manner, statutes regulating the production and sale of lard have been held valid, as a proper exercise of the police power: State *vs.* Snow, 81 Iowa, 642; State *vs.* Asleson, 50 Minn., 5.

Similar legislation affecting the production and manufacture of vinegar has also been sustained. People *vs.* Girard, 145 N. Y., 105; People *vs.* Niagara Fruit Co., 75 App. Div., 11, affd. 173 N. Y., 629; People *vs.* Heinze Co., 90 App. Div., 408; People *vs.* Windholz, 92 App. Div., 569; People *vs.* Worden Grocery Co., 118 Mich., 604; Weller *vs.* State, 53 Ohio St., 77.

Statutes regulating the standard of baking powder used in the making of food have also been held constitutional. Stolz *vs.* Thompson, 44 Minn., 271; State *vs.* Sherod, 83 N. W., 417; 80 Minn., 446; Missouri *vs.* Layton, 160 Mo., 474; 187 U. S., 356.

A statute of the State of New York prohibiting the adulteration of coffee was held constitutional by this court in the case of Crossman *vs.* Lurman, 192 U. S., 189.

And so on through the whole long range of food products. Wherever the Legislature in its wisdom, with a view to protecting the health of the people and impelled solely by this desire, has controlled the manufacture, production and supply of articles of food, the courts have been unanimous in upholding the constitutionality of these health enactments.

The argument of plaintiff in error is twofold:

First, he attacks the section in question because it reposes an arbitrary power in the Board of Health to

grant an application for a permit to sell milk. In other words, that the Board of Health possesses a discretion not reviewable by the courts.

Second, that the section is attacked because it affects milk dealers only, and therefore comes under the head of class legislation.

These two points may be considered in their turn:

(*a*) Section 66 of the Sanitary Code is a purely administrative function of the Board of Health *duly delegated by the Legislature.*

It cannot be doubted that the Legislature has the power to create municipal Boards of Health and to vest in them the power to enact health ordinances.

This question has been well discussed in the Court of Appeals in a case cited by Judge Bartlett in his opinion (73 N. Y.), namely, Polinsky *vs.* People, 73 N. Y., 65, which case arose upon the conviction of defendant for the violation of the Sanitary Code in relation to the sale of adulterated milk.

The Court of Appeals said that

> "The Legislature in the exercise of its constitu-
> "tional authority may lawfully confer on boards of
> "health the power to enact sanitary ordinances
> "having the force of law within the districts over
> "which their jurisdiction extends is not an open
> "question. This power has been repeatedly recog-
> "nized and affirmed (Metropolitan Board of Health
> "*vs.* Heyster, 37 N. Y., 661; Health Department
> "*vs.* Adam Knoll, 70 *Id.* 530; People *ex rel.* Cox *vs.*
> "Justices of Sessions, 7 Hun., 214)."

Polinsky *vs.* People, 73 N. Y., 69.

This power is not seriously disputed by the plaintiff in error, one of whose contentions appears to be that the power to issue permits subject to certain conditions is violative of the Fourteenth Amendment.

But in this case this question is not before the Court, because plaintiff's complaint in the State courts was not as to the form of the permit, or that unreasonable conditions were attached thereto, but that he was not obliged to have a permit at all.

By well settled authorities, so far as the conditions of a possible permit may be considered, the Court will not assume that they will be unreasonable, but as has been said, it is supposed that this question cannot be raised before this Court.

It is well settled in this Court that the performance by Boards of Health of the duties intrusted to their care by the State Legislature, although the fulfillment of these responsibilities carry with it the exercise of a reasonable discretion, is not a delegation of legislative power reposed solely in the Legislature, but an exercise of administrative and ministerial functions by agents best qualified to understand the conditions of the case and to appreciate the necessities of the exercise of their power.

Barbier *vs.* Connolly, 113 U. S., 27.
Dent *vs.* West Virginia, 129 U. S., 114.
Crowley *vs.* Christensen, 137 U. S., 91.
Field *vs.* Clark, 143 U. S., 649.
In re Kollock, 165 U. S., 526.
Davis *vs.* Massachusetts, 167 U. S., 43.
Wilson *vs.* Eureka City, 173 U. S., 32.
Grundling *vs.* Chicago, 177 U. S., 183.
Fisher *vs.* St. Louis, 194 U. S., 361.
Jacobson *vs.* Massachusetts, 197 U. S., 11.
In re Flaherty, 105 Cal., 558; 38 Pacif., 981.
Fitts *vs.* Atlanta, 67 L. R. A., 803 (Georgia).
Blue *vs.* Beach, 56 N. E., 89, 93 (Indiana); 155 Ind., 121; 80 Am. St. Rep., 195.

Isenhour *vs.* State, 157 Ind., 517; 62 N. E., 40; 87 Am. St. Rep., 228.

Hengehold *vs.* City of Covington, 57 S. W., 495.

State *vs.* Broadbelt, 89 Md., 565; 73 Am. St. Rep., 205; 43 Atl., 773.

Love *vs.* Judge of Recorders' Court, 128 Mich., 552; 87 N. W., 785, 788.

Commonwealth *vs.* Plaisted, 148 Mass., 375; 12 Am. St. Rep., 566; 19 N. E., 224; 2 L. R. A., 142.

Polinsky *vs.* People, 73 N. Y., 65.

People *ex rel.* Nechamcus *vs.* Warden, 144 N. Y., 529.

State *vs.* Briggs, 77 Pacif., 750 (Oregon).

In the case of Dent *vs.* West Virginia, 129 U. S., 114, in an able opinion by Mr. Justice Field, where the constitutionality of a statute requiring all physicians not graduates of a college, practicing within the State, to obtain a license from the Board of Health upon examination by said Board as to their competency, was sustained, it was said at page 124:

> "It authorizes an examination of the applicant "by the Board of Health as to his qualifications "when he has no evidence of them in the diploma "of a reputable medical college in the school of "medicine to which he belongs, or has not prac- "ticed in the State a designated period before "March, 1881. *If, in the proceedings under the "statute, there should be any unfair or unjust "action on the part of the Board in refusing him "a certificate, we doubt not that a remedy would be found in the courts of the State. But no such "imputation can be made, for the plaintiff in error "did not submit himself to the examination of the "Board after it had decided that the diploma he "presented was insufficient.*"

The latter portion of this language can be applied with great force to the facts in the case at bar. The plaintiff in error in the case before the Court raises the point that there is no remedy in case of a refusal by the Board of Health to issue a permit. But, as has been repeatedly said, his real claim is not that he has been refused a permit, but that he is not allowed to sell without any permit. If the complaint of plaintiff in error related to the refusal to renew his permit, then it would be wrong to have before the Court the facts relating to and the reasons for such refusal; and even in such case, if the ordinance is valid, this Court must not set in review the action of the Board of Health.

In the case of Field *vs.* Clark, 143 U. S., 649-694, the Court draws a clear distinction between the delegation of a power to make a law and the administration of the law by a duly constituted agent of government which involves an exercise of discretion reposed in him by the law-making power. As was said by the Court:

> "There are many things upon which wise and "useful legislation must depend which cannot be "known to the lawmaking power, and must there- "fore be a subject of inquiry and determination "outside of the halls of legislation" (143 U. S., 694).

The language of the Court in the case of Gundling *vs.* Chicago, 177 U. S., 183, is equally conclusive on this point. There the Court held that an ordinance of the City of Chicago authorizing the issuance of a license to persons to sell cigarettes upon payment of one hundred dollars was not in conflict with the Fourteenth Amendment of the Federal Constitution. Speaking of the facts, the Court said, at page 186:

> "There is no proof nor charge in the record that "there has been any discrimination against indi- "viduals applying for a license or any abuse of dis-

"cretion on the part of the Mayor. Whether deal-
"ing in and selling cigarettes is that kind of a
"business which ought to be licensed is, we think,
"considering the character of the article to be sold,
"a question for the State, and through it for the
"City to determine for itself, and that an ordinance
"providing reasonable conditions upon the perform-
"ance of which a license may be granted to sell such
"article does not violate any provision of the
"Federal Constitution." (177 U. S., 187).

The power to exercise a reasonable discrimination in the interests of health and safety is granted to the licensing authorities by the Court in the case of Fisher *vs.* St. Louis, 194 U. S., 361, where a reasonable discretion was allowed to the Municipal Assembly of St. Louis in granting or refusing a license for maintaining a dairy and cow stable within the city limits.

In the case of Jacobson *vs.* Massachusetts, 197 U. S., 11, where the Court sustained a compulsory vaccination law, Justice Harlan said, at page 27:

"Applying these principles to the present case,
"it is to be observed that the Legislature of Massa-
"chusetts required the inhabitants of a city or town
"to be vaccinated only when in the opinion of the
"Board of Health that was necessary for the public
"health or the public safety. The authority to de-
"termine for all what ought to be done in such an
"emergency must have been lodged somewhere or
"in somebody; and surely it was appropriate for
"the Legislature to refer that question, in the first
"instance, to a Board of Health, composed of per-
"sons residing in the locality affected, and appointed
"presumably because of their fitness to determine
"such questions. To invest such a body with au-
"thority over such matters was not an unusual nor
"an unreasonable or arbitrary requirement."

The cases decided in the State courts have also given their entire approval to this principle. There is here no such arbitrary exercise of power as was manifested in the cases of Yick Wo *vs.* Hopkins, 118 U. S., 356; Noel *vs.* People, 187 Ill., 587; Brooklyn *vs.* Breslin, 57 N. Y., 591, and other cases relied upon by the plaintiff in error. In some of these cases the facts showed that the officer or board vested with the authority to decide, did, as a matter of fact, arbitrarily exercise his or its power against the plaintiff. This was especially true in the case of Yick Wo *vs.* Hopkins, 118 U. S., 356. On the broad power vested in administrative agents of government to exercise their discretion under suitable circumstances there is almost unanimous agreement among the courts upholding its constitutionality. It is only where this discretion is shown, as a matter of fact, to have been grossly abused, or where the law in explicit terms grants the despotic power to refuse a right when all conditions have been fully complied with, that the courts are ready and under a most imperative duty to overthrow and defeat such pernicious legislation hostile to the spirit of American institutions. It is no excuse, however, that because officials abuse their power, the law granting them such powers is invalid and violative of the Federal Constitution. An abuse of power does not disprove the legality of its investiture.

Powell *vs.* Pennsylvania, 127 U. S., 678, 686.

Williams *vs.* Mississippi, 170 U. S., 213, 225.

People *ex rel.* Nechamcus *vs.* Warden, 144 N. Y., 529-539.

(b) *Section 66, of the Sanitary Code, imposes no unjust, unreasonable or arbitrary classification.*

Another contention of the plaintiff in error in his assault upon the constitutionality of the section is the one

that makes it an arbitrary classification of milk dealers, whereas the other provisions of the Sanitary Code, with few exceptions, make no attempt to control or regulate other trades or callings. It does not follow, however, that because the Sanitary Code does not contain any provisions regulating all the numerous avocations pursued by mankind, that there are no other provisions of law contained in the general statutes which vest a supervisory power over such pursuits as may be necessary to confine, restrict and control in the interests of the general mass of the people. It is not necessary or expedient to enumerate the numerous general provisions of law contained in the statute books which give the latter a controlling or supervisory power. A glance at the permit digest printed at folio 34, of the transcript of records will, we submit, be sufficient to convince the Court that few subjects properly within the jurisdiction of the Board of Health have been neglected by the Board. Other callings may not affect the public health, and for that reason would not be amenable to the regulations of a health board. It is fair to assume, however, that every business, either retail, wholesale or manufacture, which has a direct influence on the health of the community, is included within the section of the Sanitary Code. In what manner has section 66 imposed arbitrary restrictions or made an unjust and discriminatory classification of tradesmen? All milk dealers, dealing in the commodity of milk within the metropolitan city, where so much depends on the wholesomeness and purity of food products, are within the purview of the ordinance. It is true that the section affects one class of tradesmen, but each individual of that class are under the same restrictions. It has not been shown that the conditions under which one dealer would be permitted to sell milk are any different from those affecting another. It is to be presumed that the conditions imposed are uniform and alike. It may be conceived, however, that the conditions exacted in one portion of the city may be justly different from those

demanded in a less crowded section. All this is to be left to the wise judgment and discretion of the health officers. The cases passing upon the questions of class legislation which have arisen in this Court are far too numerous to include within the limits of a brief. For that reason we have submitted to the Court but a few of the decisions in which that question has been presented to the Court for consideration:

Slaughterhouse Cases, 16 Wall. 36.
Missouri *vs.* Lewis, 101 U. S., 22.
Barbier *vs.* Connolly, 113 U. S., 27.
Soon Hing *vs.* Crowley, 113 U. S., 703.
Missouri Pacific Ry. Co. *vs.* Humes, 115 U. S., 512, 519.
Hayes *vs.* Missouri, 120 U. S., 68.
Missouri, etc., Ry. Co. *vs.* Mackey, 127 U. S., 205.
Powell *vs.* Pennsylvania, 127 U. S., 678-687.
Walston *vs.* Nevin, 128 U. S., 578.
Dent *vs.* West Virginia, 129 U. S., 114.
Bell's Gap Ry. Co. *vs.* Pennsylvania, 134 U. S., 232.
Crowley *vs.* Christensen, 137 U. S., 86.
Pacific Exp. Co. *vs.* Seibert, 142 U. S., 339.
Giozza *vs.* Tiernan, 148 U. S., 657.
Columbus, etc. Ry. Co. *vs.* Wright, 151 U. S., 470.
Marchant *vs.* Penn. Ry. Co., 153 U. S., 380.
St. Louis, etc., Ry. Co., *vs.* Mathews, 165 U. S., 1.
Jones *vs.* Brim, 165 U. S., 180.
Davis *vs.* Massachusetts, 167 U. S., 43.
Central Loan, etc., Co. *vs.* Campbell Commission Co., 173 U. S., 84.
Fisher *vs.* St. Louis, 194 U. S., 361.
Jacobson *vs.* Massachusetts, 197 U. S., 11.

It is our purpose to quote from but a few of these cases as exemplifying the general principle.

Mr. Justice Fields who wrote for the Court in Barbier *vs.* Connolly, 113, U. S., 27, said in the case of Soon Hing *vs.* Crowley, 113 U. S., 703, 708:

> "There is no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night. There may be no risks attending the business of others, certainly not as great as where fires are constantly required to carry them on. The specific regulations for one kind of business which may be necessary for the protection of the public can never be the just ground of complaint, because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

A State statute of Texas taxing all persons engaged in the sale of spirituous, vinous or malt liquors was held to be constitutional by this Court in the case of Giozza *vs.* Tiernan, 148 U. S., 657. At page 662 Chief Justice Fuller said:

> "This statute affects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree whether considered as imposing restrictions upon the sale in the exercise of the police power of the State, or as levying taxes upon occu-

"pations under authority of the Legislature in that "behalf, petitioner was not arbitrarily deprived of "his property nor denied the equal protection of the "laws."

In the case of Jones *vs.* Brim, 165 U. S., 180, a statute of Utah which provided that "any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway where such highway is constructed on a hillside shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway," was held to be constitutional, although all other persons using the highway were not subject to liability.

The Court said, at page 184:

"The statute being general in its application em- "bracing all persons under substantially like circum- "stances, and not being an arbitrary exercise of "power, does not deny to the defendant the equal "protection of the laws."

In the case of Powell *vs.* Pennsylvania, 127 U. S., 678, which sustained the oleomargarine legislation of Pennsylvania, the Court said, at page 687:

"The objection that the statute is repugnant to the "clause of the Fourteenth Amendment forbidding "the denial by the State to any person within its "jurisdiction of the equal protection of the laws is "untenable. The statute places under the same re- "striction, and subject to like penalties and burdens, "all who manufacture, or sell, or offer for sale, or "keep in possession to sell, the articles embraced "by its prohibition, thus recognizing and preserving "the principle of equality among those engaged in "the same business."

The opinion of the Court in the case of Fisher *vs.* St. Louis, 194 U. S., 361, is equally pertinent. There the Court said (page 371):

> "We do not regard the fact that permission to "keep cattle may be granted by the Municipal As- "sembly as impairing in any degree the validity of "the ordinance, or as denying to the disfavored dairy "keepers the equal protection of the laws. Such "discrimination might well be made where one per- "son desired to keep two cows and another fifty, "where one desired to establish a stable in the heart "of the city, and another in the suburbs, or where "one was known to keep his stable in a filthy con- "dition and another had established a reputation for "good order and cleanliness. Such distinctions are "constantly made the basis for licensing one person "to sell intoxicating liquors and denying it to others. "The question in each case is whether the establish- "ing of a dairy and cow stable is likely in the hands "of the applicant to be a nuisance or not to the "neighborhood, and to imperil or conduce to the "health of its customers. As the dispensing power "must be vested in some one, it is not easy to see why "it may not properly be delegated to the Municipal "Assembly which enacted the ordinance."

A review of these decisions is sufficient to show that the equal protection of the laws which the plaintiff in error demands was fully accorded him. There were no facts upon which a claim could be based that other milk dealers in The City of New York were given privileges which were denied to plaintiff in error. The legislation itself is general in its terms and is applicable to all alike under similar conditions.

Nor can the plaintiff in error claim that the section of the Code abridged or curtailed his rights as a citizen. The trade which he pursued was subject to regulation for the benefit of good order and sound health of the residents of

the city. Any health regulation which controlled his right to sell milk was based and founded upon the general interest of society, and, as we have tried to prove, no health regulation or sanitary ordinance is more necessary and conducive to the public health than those provisions which have for their object the enforcement of laws relating to the sale of pure milk. In conclusion, we say that section 66 of the Sanitary Code, being a valid regulation for the protection of health, is a proper exercise of the police power of the State, and is not violative of the first section of the Fourteenth Amendment of the Constitution of the United States.

III.

For the foregoing reasons the judgment of the State Court should be affirmed.

Dated 26th September, 1905.

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